Nancy Ives
Executive Director

the fair coalition
Ensuring Fair Access to Energy

September 4, 2006

Mr. Daryl Francois
Office of Indian Energy and Economic Development
Bureau of Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Mr. David Meyer
Office of Electricity Delivery and Energy Reliability
U.S. Department of Energy
1000 Independence Avenue, NW
Washington, D.C. 20585

Attention: Section 1813 ROW Study
Office of Indian Energy and Economic Development
Room 20 – South Interior Building
1951 Constitution Avenue, NW
Washington, D.C. 20245

Submitted via e-mail to: IEED@bia.edu

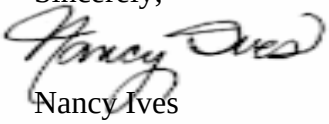
Subject: Section 1813 Comments

Dear Messrs. Francois and Meyer:

On behalf of the Fair Access to Energy Coalition (FAIR), a broad-based, non-partisan group that is seeking a solution to ensure the movement of energy across Indian tribal lands on reasonable terms, I respectfully submit FAIR's Requests for Modifications to the Draft Report To Congress, Energy Policy Act of 2005, Section 1813, Indian Land Rights of Way Study ("Draft"). Our submission includes the following documents: (1) 14 Critical Corrections; (2) Requests for Modifications to the Draft Report to Congress; and (3) Exhibits containing supporting documents and analyses. These submissions outline changes which we believe should be made in the Final Report in order to provide Congress with a balanced presentation of the problem facing America as well as some of the potential solutions to that problem.

Thank you for the consideration of our comments to the Draft Report. If you have any questions about these comments, please contact me at 619/540-3751.

Sincerely,



Nancy Ives
Executive Director
Fair Access to Energy Coalition

cc: Bob Middleton
Abe Haspell
Kevin Kolevar
Jim Cason

the fair coalition

Ensuring Fair Access to Energy

Fair Access to Energy Coalition's "Top 14" Critical Corrections for the Draft Report to Congress Under Section 1813 of the Energy Policy Act of 2005

1. **The Draft Report ignores the President's national energy policy.** The Draft Report utterly fails to evaluate the impact of tribal energy right-of-way monopolies on President Bush's policy of promoting America's energy independence through enhanced reliance on domestic energy sources. Every cost, fee, tax, risk and uncertainty imposed on the U.S. energy market will distort the supply decisions of energy distribution utilities and their customers. In the case of natural gas, such fees make foreign liquefied natural gas relatively more attractive. The Draft Report fails to contend with these important competitive dynamics. It does not address the obvious collision between the current tribal right-of-way policy and the President's profound commitment to ensuring America's energy future and reducing its dependence on off-shore energy sources.

2. **Congress can and must reasonably reconcile tribal sovereignty with the need of all Americans for reliable, affordable sources of energy.** The Draft Report ignores concrete examples of such reasonable reconciliation between tribal sovereignty and other public interests. For example, the Indian Mineral Development Act and the Indian Gaming Regulatory Act require modest limitations on tribal sovereignty designed to enhance the contracting parties' economic relationship. The final report should include these examples to illustrate that a reasonable balance between tribal self-determination and self-governance, on the one hand, and sound national energy policy, on the other hand, is fully possible in the light of Congressional experience.

3. **Tribal sovereignty is not unlimited.** The Draft Report's description of tribal sovereignty is incomplete and inaccurate. The Draft Report overlooks well established constitutional, statutory, and decisional law which finds that Congress has *plenary* authority over Indian affairs. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.") (Internal citations omitted). "Plenary" has been defined as "[f]ull, entire, complete, absolute, perfect, unqualified." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990). In sum, tribal sovereignty is always subject to Congressional determination. Only by recognizing Congress' plenary authority can the final report fulfill its specific mandate to recommend "appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROWs on tribal land". EPAct § 1813(b)(2).

4. **The Draft Report ignores important infrastructure distinctions found in the very text of Section 1813.** Congress directed the Departments of Energy and the Interior jointly to conduct "an analysis of relevant national energy transportation policies relating to *grants, expansions and renewals* of energy rights-of-way on tribal lands." No where in the Draft Report is the monopoly

power tribes effectively exercise acknowledged, particularly in right-of-way renewals and in grants/expansions of geographically constrained energy pathways (due to terrain or urban "chokepoints"). Optimal outcomes are more likely where each side has plausible choices and cost-effective alternatives to a negotiated arrangement. Otherwise, tribes can hold hostage energy infrastructure to extract "consent" payments that approximate the sunk cost of existing infrastructure or the avoided costs of build-around infrastructure. Nor does the Draft Report acknowledge that successful tribal-industry negotiations only tend to occur where the two sides' interests are aligned: for example, in the areas of on-reservation energy exploration/production and local energy distribution. The Draft Report utterly fails to discuss, analyze, and evaluate these important complexities and nuances, despite Congress' clear direction in Section 1813 that the Departments do so.

5. **Many Indian treaties have already expressly conferred the signatory tribe's consent to federally permitted utility rights-of-way.** In such cases, the treaties both delineate and circumscribe the tribe's sovereignty by explicitly granting prospective and continuing consent to rights-of-way, for as long as the treaties are in force. The Draft Report ignores the role of treaties in Indian law and in Congress' consideration of appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for rights-of-way under the treaties. The final report should acknowledge that these treaties are controlling and cannot be abrogated by regulatory fiat – or by tribal ambitions to withhold consent that has already been given.

6. **The Draft Report's conclusions that "most energy ROW negotiations are completed successfully" and that "the problem may be self-limiting" are superficial and irrationally exuberant.** The Draft Report's pronouncement that right-of-way negotiations are generally completed "successfully" is naïve and immediately begs many questions. At what *price* to the public interest were those negotiations concluded? How did the outcomes compare to the results that would have been achieved had well-established fair market value and U.S. constitutional just-compensation principles governed the negotiations? For *whom* were the negotiations "successful"? Who was the champion of ratepayers and consumers in private negotiations between sovereign tribes and federally regulated cost-of-service infrastructure firms? The Draft Report superficially and inaccurately confuses mere closure of a ROW negotiation with "success" in the public interest. Equally misplaced is the Draft Report's assertion that the right-of-way problem is "self-limiting". That assertion erroneously assumes that the environmental, cultural, archaeological, permitting, raw material, labor, construction, installation-disruption and other tangible and intangible costs of build-around solutions to extreme right-of-way demands are low. Indeed, in cases where those alternatives simply do not exist, the build-around or alternative infrastructure costs are theoretically infinite. In those cases, there are *no* limits. Just as, nearly a century ago, Congress found no reason to expect *private* landowner ambitions to capture public infrastructure benefits would be

"self-limiting", there is no reason for such misplaced optimism about *tribal* landowner self-restraint.

7. **Fair Market Value is a lawful, effective and universally recognized valuation standard for both private and public lands.** The United States Constitution and its underlying statutes require "just compensation" to Indian tribes for the use of tribal lands in the public interest. The 1948 Indian Right of Way Act also requires the Secretary of the Interior to ensure that right-of-way compensation is "just." Fair market value is the governing standard where landowners are sovereign. At every level of government, including tribal, local statutes determine just compensation by relying on the property's fair market value. The federal government has used fair market value to calculate and compensate tribes for their land under the Indian Claims Commission Act and other statutes. It uses a similar standard in valuing Indian land consolidations. Numerous tribal governments use an identical fair market value, just compensation standard when valuing their own constituent's property interests. Given the 1948 Act's command that compensation be "just," there is no principled reason to exempt tribal rights-of-way from a fair market value, just compensation standard.

8. **In the private sector, and outside the realm of tribal lands, eminent domain serves to discipline private landowner ambitions to capture the public benefits of crossing energy infrastructure**. The desire of tribes to obtain energy right-of-way fees based on *the value of infrastructure to the public* – as opposed to any diminution of tribal land values resulting from the installation and presence of the infrastructure – is not a new phenomenon. Ranchers and farmers in the developing West tried to do the same thing before Congress intervened in the first half of the 20th century by delegating the condemnation authority of the United States to regulated and certificated transportation and energy infrastructure stakeholders. The mere availability of those rarely used eminent domain powers – and the attendant objective, judicial process of determining the truth about just compensation – governs landowner rent-seeking ambitions and produces generally reasonable, moderate, and negotiated outcomes concerning just compensation. The Draft Report does not reflect any of these public policy concepts.

9. **The Federal Government's trustee responsibility is fully consonant with reform of current tribal right-of-way policies.** The Draft Report fails to recognize that a competent and enlightened trustee looks after the long-term interest of the beneficiary and that, even in the short-term, a reliable and transparent valuation standard is necessary. Failure to implement a right-of-way acquisition and renewal process that is consistent, transparent, objective and reasonable will mean that any tribe can demand exorbitant, unreasonable, economically stagnating, and self-defeating right-of-way "consent" fees. This will only serve to increase Indian Country's energy isolation, discourage job creation and investment, and postpone the long-overdue economic development and national economic participation of Native Americans. Because there are

currently no standards whatsoever, the *status quo* carries an inherent risk of underpayment to tribes.

10. **Current tribal energy right-of-way tactics are forcing energy companies to cancel needed infrastructure projects or route other projects around tribal lands, costing consumers hundreds of millions of dollars and resulting in underdeveloped energy infrastructure.** The Draft Report erroneously suggests that delaying, canceling, or re-routing energy infrastructure costs are not consequential. This suggestion stands in stark contrast to industry's Indian project submissions. For example, Sempra Energy's submission, which is one of many illustrations and is discussed in detail herein, shows that current tribal right-of-way policy imposed $1.5 billion in additional costs on a project intended to serve consumers' energy and reliability needs in southern California – an area designated by DOE as a "Critical Congestion Area" in the national power transmission network.

11. ***Today's* cases of tribal over-reaching bode ill for the *future* if the process for negotiating Indian rights-of-way is not reformed.** By focusing on history, the Draft Report fails to evaluate the impact of *current* tribal right-of-way policy on *future* energy infrastructure investments. By narrowly focusing on the transportation rate impact, the Draft Report fails to address all direct and indirect aspects of the current tribal ROW policy's cost to national welfare. The Draft Report fails to evaluate the current policy's impact on energy *commodity* prices – not merely transportation rates – paid by consumers due to reduced infrastructure optionality in accessing electricity power plants and gas supply basins. The Draft Report ignores the distorting impact of the tribal right-of-way phenomenon on supply source decision-making by utilities that serve residential and business consumers, particularly the incentives utilities will have to turn to foreign sources of energy. The Draft Report overlooks other indirect cost impacts, such as the wasteful environmental, construction and input costs arising from energy infrastructure stakeholders choosing to avoid tribal lands. Without even considering the increased costs of new construction, FAIR estimates that the current policy will likely increase existing energy infrastructure costs needlessly and by over $700 million *annually* as tribes and energy companies begin renewing energy rights-of-way now existing on tribal land (as many as 271 in the next 15 years).

12. **The Congressional options proposed in the Draft Report should be restructured to address the criteria Congress specified.** Section 1813 requested a study outlining "*standards and procedures* for determining fair and appropriate compensation" for "grants, expansions and renewals" of rights of way. Any option sent to Congress that lacks standards and procedures is merely a "no action" alternative. Thus, the current Draft's Options (a) and (b) are two sub-options under one non-option: the status quo, which lacks *any* standards or procedures. They should be deleted as inconsistent with the statutory directive. Option (c) proposes some potentially useful standards but because it allows

either party to reject values resulting from the standards, it fails entirely to provide a procedure as Congress has requested. Option (c) should therefore be revised to provide either the procedure developed in Option (d) or another procedure. Finally, the Final Report should provide specific options to be used for renewals and expansions of existing rights-of-way, where sovereignty considerations are reduced and the potential for over-reaching is at its zenith.

13. **The Draft Report does not evaluate *at all* the looming collision between tribal right-of-way "consent" tactics and the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC) to certificate interstate energy transmission infrastructure, and approve its abandonment, in the public interest.** Under both the Federal Power Act and the Natural Gas Act, FERC is charged with the exclusive and preemptive federal authority to issue certificates of public convenience and necessity for, respectively, electricity and gas transmission infrastructure in interstate commerce. Current tribal right-of-way "consent" demands encroach on FERC's sole jurisdiction to determine the location of interstate energy infrastructure, and to decide when that infrastructure serves – and no longer serves – the public interest. Indeed, there is no indication that FERC has even been consulted in the preparation of the Draft Report. Substantial and relevant subject matter expertise, experience, and wisdom are resident at the Commission on the matters addressed in the preparation of the Draft Report, and Congress ought to have the full benefit of FERC's insights in the Final Report.

14. **The Draft Report's failure to assess the costs and benefits of the options it has offered to Congress flouts established principles of sound public policy analysis.** The federal government has long recognized that sound public policy-making requires rigorous cost-benefit accounting of current and proposed rules and policies. The Draft Report fails to provide information on the national costs and benefits of even current tribal ROW policy, let alone any of the other options that it identifies. The Departments also appear not to have carried out Section 1813's requirement of direct consultation with consumers and relevant governmental entities at the state and local levels to discern their perspectives about the impact of current policy and about any need for reform. The opinions of businesses, tribes and their hired consultants simply do not capture the scope of the empirical inquiry Congress has requested. Because the Draft Report does not even attempt to provide the cost-benefit data Congress requires to take informed action, it cannot – as written – competently discharge its statutory mandate.

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Fair Access to Energy Coalition's Requests for Modifications to the Draft Report to Congress

September 4, 2006

1. Introduction

The Fair Access to Energy Coalition ("FAIR") respectfully submits its Requests for Modifications to the Draft Report to Congress, Energy Policy Act of 2005, Section 1813, Indian Land Rights of Way Study ("Draft"). The Departments have requested that parties who wish to comment on the Draft do so by submitting specific, targeted comments or additions in order to facilitate the agencies' review, revision and finalization of the Draft for submission to the Congress in final form by September 30, 2006. To that end, FAIR's detailed comments below are structured according to the agencies own Table of Contents and are organized by section, beginning with Section 1.1 and continuing through the end of the Draft Report.

Moreover, in an effort to highlight and summarize for the agencies the most important aspects of the Draft that must be changed if the agencies are to fulfill their statutory mandate from Congress, FAIR also submits its "14 Critical Corrections" list for changes that should be included in the Final Report. FAIR respectfully requests, at minimum, that each of the "14 Critical Corrections" Requests for Modification be made in order to provide Congress with a balanced presentation of the problem facing America and some of the available solutions.

1.1. Statutory Language of Section 1813

1.2. Scope of Section 1813

1.3. Issues Raised in Scoping the Study

1.3.1. Tribal Sovereignty, Consent, and Self-Determination

As discussed in FAIR's response to Ch. 2 below, the Draft oversimplifies and mischaracterizes the issue of tribal sovereignty. The Draft's one-sided description of tribal sovereignty in the scope section is particularly troubling since it improperly limits a consideration of other key national energy policies in Ch. 3, and prevents a representation to Congress of the full range of options in Ch. 4. In order to set the stage for a balanced discussion in Chs. 2-4, the agencies should alert Congress in the opening section of the Final Report to several fundamental principles affecting tribal sovereignty and self-determination:

(1) Congress has plenary authority over Indian tribes.[1] As such, Congress possesses wide discretion to reconcile tribal sovereignty with other important national

[1] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.")(Internal citations omitted). "Plenary" has been defined as "[f]ull, entire, complete, absolute, perfect, unqualified." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990).

policies and goals, including the need of all Americans to have access to reliable, affordable energy. *See* §§ 2.3 - 2.4 & Ch. 3 below; Ex. A at 7-16.

(2) Some tribes have entered into treaties which specifically chronicle the tribe's continuing consent to ROWs across their reservations, under certain circumstances. In such cases, the treaties both delineate and circumscribe the tribe's sovereignty by explicitly granting prospective consent for certain ROWs. *See* § 2.4 below; Ex. A at 9-10.

(3) Tribes themselves have already relinquished some elements of their sovereignty in exchange for other benefits, such as contractual arrangements for economic gain in the context of mineral development and gaming. *See* § 2.4 below; Ex. A at 8-9. These examples demonstrate how tribal sovereignty can be curtailed for the mutual benefit of tribes and other parties in furtherance of the important national policy of energy reliability and affordability for all Americans.

1.3.2. Increasing Costs of Energy ROWs

The Draft states "Industry parties noted concern about the increasing costs of energy ROW renewals because of energy companies' investment in existing facilities and the potential for regulatory constraints against abandoning an energy line." Draft at 5. However, this section does not address the costs that current policy imposes on new construction nor does it assess the potential impact of current policy on existing infrastructure. In order to provide a more complete assessment of the economic impact of the current ROW pricing regime, the Final Report should address the following concerns:

First, projects that are forced to build around tribal lands will traverse less advantageous routes, consume more resources, and/or impose a greater burden on the environment than would otherwise have been the case. Several industry submissions point to costly examples of build-around that have already taken place and more can be expected as new infrastructure is constructed in regions that contain tribal lands.[2] Of course, even if companies chose not to build around tribal lands, tribes have the ability and incentive to charge the companies an amount just below those build around costs.

Second, the extra expense associated with building around tribal lands impedes projects that would yield net benefits to consumers if fair market value ("FMV")-based prices were charged on tribal lands. Construction delays and cancellations reduce consumers' access to alternative energy supplies, making them more likely to face greater energy *commodity* costs (as opposed to higher *transport costs*) and/or lower reliability than would otherwise have been the case.

[2] *See, e.g.*, Supplemental comments behalf of San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas), June 9, 2006 at 3-4.

Third, many energy transporters, including Transwestern, PNM, Idaho Power, Southern California Gas Company (SoCal Gas) and San Diego Gas & Electric (SDG&E), must renew ROW associated with pivotal existing facilities within the next fifteen years. Under current policy, tribes have both the incentive and the ability to charge ROW renewal fees that reflect the companies' cost of uprooting their existing transportation infrastructure and building around the tribal lands on which they are currently located.[3]

To provide additional perspective on the costs that current ROW pricing policy on tribal lands has already imposed on the United States, the Final Report should fully address the detailed case studies provided by Sempra Energy (Sempra), which have thus far been omitted from consideration. Sempra is the parent company of both SDG&E and SoCalGas. Together, these companies serve 23 million electric and gas customers in Southern California, one of the largest customer bases of any U.S utility.[4] The Sempra case study documents both: (1) increased energy costs and decreased reliability from delayed and/or cancelled projects and (2) increased transportation costs arising from the need to build around tribal lands. Below, we summarize the Sempra case study, providing additional detail gathered from public documents.

> Sempra's submission explained how the activities of the Pechanga Band of Luiseno Indians blocked SDG&E's Valley-Rainbow Interconnect project, a $360 million dollar, 31 mile, 500 KV electric transmission line that Sempra proposed in 2000 to maintain reliability and serve the future energy needs of San Diego County residents.[5] SDG&E studied more than 80 routes to determine the corridors for its Valley-Rainbow Interconnect project that would have the least impact on the residents, businesses and environment in Riverside and San Diego Counties. Of these 80 routes, the preferred route was located on the southern and eastern boundary of the Pechanga Reservation. A second route was also identified; it would go through a large undeveloped parcel of land known as the Great Oak Ranch, west of the city of Temecula. This route appeared potentially desirable because it traversed private land and it raised fewer environmental concerns than the third option. The third route, situated west of Interstate 15, was recognized as problematic because it would traverse an environmentally

[3] It is not unusual for energy transmission facilities to remain in service for 30 years or more. Long depreciation schedules for accounting purposes are also common. The long economic lives of such facilities makes it extremely wasteful to remove them from their current locations on tribal lands, only to rebuild them elsewhere at public expense.

[4] *See* Sempra Submission, May 15, 2006 at p. 1.

[5] *Ibid.* at p.2.

sensitive area, and in addition, would enter populated areas, triggering the need to remove businesses and homes.[6]

The Pechanga tribe opposed the first route and refused to grant the right of way at any price. Because of the tribe's opposition, SDG&E focused its attention on the second route through the privately owned Great Oak Ranch, adjacent to the reservation. In March 2001, SDG&E filed an application with the CPUC for approval of the Valley Rainbow line and the Great Oak route. In May 2001, the Pechanga tribe acquired the Great Oak Ranch. Shortly thereafter, SDG&E was informed that the Tribe opposed the siting of the Valley-Rainbow Interconnect on the Great Oak property, much as it had previously opposed the inclusion of such a transmission corridor on tribal lands.[7] The Pechanga subsequently petitioned the Bureau of Indian Affairs (BIA) to have the land placed in trust, effectively annexing the land into the reservation and eliminating this route as a potential transmission corridor.[8] The Pechanga petition was successful; SDG&E lost its appeal of the ruling and was forced to cancel the project. As a result of this project not moving forward, customers in southern California will experience over $500 million in additional congestion[9] and reliability-related costs until such time as an alternative transmission project can be placed in service.[10]

As discussed in a recent Department of Energy study, Southern California still needs new transmission capacity to access lower cost generation outside the region, improve reliability, and comply with California's renewable portfolio standard.[11] To help meet these needs, Sempra initiated the Sunrise Power Link

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[6] *See* Testimony of James Avery, Senior Vice President, San Diego Gas & Electric, Regarding H.R. 3476 United States House of Representatives Committee on Resources April 17, 2002.

[7] *Ibid.*

[8] *See, e.g.*, Testimony of the Honorable Marc Macarro, Chairman, Pechanga Band of Luiseno Mission Indians. Before the House Committee on Resources. April 17, 2002.

[9] Congestion on an electric transmission line prevents customers in a given area from accessing the cheapest possible generation; instead these customers must be served by more expensive local sources. Congestion can be alleviated by adding new transmission infrastructure or new generation capacity in strategic areas.

[10] Sempra's analysis of these costs is available for review by the Departments.

[11] *See, e.g.*, National Electric Transmission Congestion (NETC) Study, U.S. DOE, (August 2006) at p. 45. As explained by DOE, "The state of California is the sixth largest economy in the world and had an estimated population in 2005 of over 36 million persons. About two-thirds of California residents live in Southern California, which faces rapidly growing electric demand. The area contains important economic, manufacturing, military and communications centers—in total, an infrastructure that

project in 2005. The Sunrise Power Link will cost *over nine hundred million dollars more* than the Valley Rainbow Interconnect would have cost and will traverse almost 110 additional miles. [12] In addition, Sempra is routing the Sunrise Power Link through the Anza-Borrego Desert State Park, a path that is opposed by several environmental groups. Even within this environmentally sensitive area, current tribal ROW pricing policy has led Sempra to route around the Santa Ysabel Reservation, which will add approximately $4 million in costs and five miles of length to the project.

Many other companies have sought to avoid building on tribal lands where possible, an alternative that the Draft recognizes and even suggests as a potential solution to the policy issue at hand.[13] Moreover, the build around costs that energy transporters and their ratepayers have thus far incurred will be just the tip of the iceberg, if current trends continue. New construction of gas pipelines and electricity transmission capacity has been limited in recent years, at least partially due to siting difficulties. However, investment in gas and electric transmission is expected to increase significantly in the near term. [14] With an upsurge in new construction of electricity and natural gas transportation infrastructure in areas containing tribal

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affects the economic health of the U.S. and the world." DOE proceeds to note that "Electrically, this is the area south of WECC transmission path 26 or SP26…. According to the California Independent System Operation (ISO), various combinations of extreme peak demand, high generation unavailability, or critical transmission losses could cause the SP26 area to be short on local generation and require the ISO to cut non-firm and firm loads to maintain grid reliability." In this same study, DOE designated Southern California as one of the two areas in the country in which it is "critically important to remedy existing or growing [transmission] congestion problems because the current and/or projected effects of the congestion are severe." (*See* NETC Study at p. viii.).

[12] The Sunrise Power Link project does achieve some benefits that were not available from the Rainbow Valley Interconnect project; in particular, the Sunrise Power Link allows SDG&E to access some remotely located renewable resources.

[13] According to a study that was commissioned by the Interstate Natural Gas Association of America (INGAA), the trade association for the North American interstate gas pipeline industry, several companies reported that they avoid locating on Native American lands and usually seek an alternative. (*See* http://1813.anl.gov/documents/docs/ScopingComments/INGAA.pdf at p. 24.).

[14] *See* FAIR Supplemental Report; Ex. B at 6-7. *See also Siting Critical Energy Infrastructure: an Overview of Needs and Challenges*, a White Paper prepared by the staff of the National Commission on Energy Policy (NCEP) in June 2006. The NCEP is a non-governmental bipartisan group of 20 energy specialists funded by the William and Flora Hewlett Foundation.

lands,[15] costly construction activities undertaken solely to build around tribal lands are likely to increase as well. At the same time, current policy provides tribes with both the incentive and the ability to acquire land at regional chokepoints. Tribes can use this land to block new projects, as in the Sempra case study presented above, and/or demand higher ROW fees.

In addition, tribal fees for ROW associated with existing infrastructure can also be expected to rise as increasing numbers of ROW expire and come up for renewal. Although many of these ROW expiration dates remain on the horizon, the potential magnitude of this issue is significant. Table 1 shows that if all natural gas pipeline ROW on tribal lands are renewed at a rate of $24,000 per mile per year and all electric transmission ROW on tribal lands are renewed at a rate of $34,000 per mile per year, tribes will collect over $700 million annually from the nation's energy transporters and their customers.[16]

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[15] In the case of gas pipelines, DOE states that "The current inventory of announced or approved natural gas pipeline projects indicates that natural gas capacity additions could increase significantly between 2006 and 2008" . *See* http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2006/ngpipeline/ngpipeline.pdf) Electric transmission capacity is also expected to expand significantly between now and 2010. A recent study commissioned by the Edison Electric Institute (EEI) documents a large portfolio of transmission projects currently under consideration by its member utilities. The study projects levels of investment in new electric transmission rising from 2003-2004 levels of $5 billion per year to $7 billion per year over the next decade and finds evidence to suggest that transmission investment could even rise to $10 billion or more per year. *See* Energy Security Analysis, Inc. *Meeting U.S. Transmission Needs*, Washington, DC: Edison Electric Institute, July 2005, at p. vii.

[16] Under the assumption that the pipelines and transmission lines in this analysis were installed many years ago and have produced no further diminution in the value of the property they traverse, this figure of $700 million in annual costs provides a rough estimate of the excess amount that would be paid to tribes, in the absence of FMV-based fees on tribal lands.

Table 1
Potential Annual ROW Fees for Existing Facilities on Tribal Land

Estimated using total miles of natural gas pipeline and electric transmission lines on tribal lands and current ROW fees of some tribes

		Natural Gas Pipelines
	7468	Miles of natural gas pipeline on Native American lands
X	80%	Percent of Native American lands which are Trust lands
X	$24,000	Dollars per mile per year ROW charge on Trust lands
=	**$144,025,714**	Dollars per year in ROW fees
		Electric Transmission Lines
	21225	Miles of electric transmission lines on Native American lands
X	80%	Percent of Native American lands which are Trust lands
X	$34,000	Dollars per mile per year ROW charge on Trust lands
=	**$579,897,321**	Dollars per year in ROW fees
		Total
	$723,923,036	Total annual ROW fees for pipelines plus transmission lines

Notes/Sources

Total miles of natural gas pipelines and electric transmission lines are estimates based on currently available maps. Miles of pipeline does not include midstream or gathering facilities. Loop lines may also be excluded.

Percent of Native American lands which are trust lands is from DOI trust report 2003 which reports 56 million acres of tribal land, 45 million of which are trust land

Annual ROW charge for natural gas pipeline is from Navajo Nation submission to 1813 study ($22 million per year for 900 miles of pipeline)

Annual ROW charge for electric transmission lines are from EEI study results submitted to 1813 study. Their survey results indicated a mean of $1.7 million for a 50 year ROW.

1.3.3. Decreasing Energy ROW Term of Years and Increasing Negotiation Periods

The Draft does not provide an appropriate context for evaluating the effects of current policy on the length of ROW terms. In order to alleviate this oversight, and correct other problems in the Draft's methodology, the following changes should be made to the Final Report:

(1) Despite its title, this Section does not include any metrics reflecting declines in ROW duration. In order to provide the appropriate context, the Draft should report that a survey of electric transmission ROWs across tribal land found the average duration of ROWs had fallen more than 35%.[17]

(2) The Draft states that "Tribal parties noted that each energy ROW over tribal lands has unique characteristics that can affect negotiation times" and proceeds to list six examples, including the large tracts of land involved and the potential cultural and religious nature of the lands that may be impacted. Draft at 6. This point should be deleted from the Final Report because it has no relevance to the issue of the rapidly declining duration of ROW terms for new or existing facilities. Moreover, these characteristics – none of which is unique to tribal lands – do not explain why negotiations for renewal of existing ROWs should be long and drawn out. The cultural and religious significance of tribal lands is already addressed in DOI's existing regulatory process for reviewing ROW applications

(3) The Draft provides misleading quotes from the Bill Barrett Corporation (BBC), which is "an oil and gas exploration and production company with extensive operations on Tribal lands, particularly on the Ute Tribe of the Uintah and Ouray Indian Reservation." As BBC acknowledges, "our experience, with its emphasis on E&P [exploration and production] operations rather than downstream issues [such as intra- and interstate gas transmission], may provide a unique perspective on the matter."[18] The Draft should explicitly recognize that one reason for BBC's "unique perspective" is tribes' interests with respect to on-reservation gathering systems to get their own oil and gas to market – interests that simply are not present when tribes negotiate ROW consent arrangements with regulated intra- and interstate pipelines that simply "pass-through" tribal lands.[19] Yet even for gathering lines, this Draft Section does not

[17] *See* Table 1 in Draft Section 5.5.1; Draft at 45.

[18] Comments of the Bill Barrett Corporation 1 (March 8, 2006).

[19] As discussed in the Draft, local gas gathering lines take gas from wells to transmission line tie-in points with the gas field. *See* Draft at 3. Gathered gas is compressed so that it can be moved at reasonable speed through interstate and intrastate gas transmission pipelines. Transmission pipelines can be thought of as energy highways; they often traverse long distances to deliver gas to local gas distribution companies (LDCs), which distribute the gas to homes, businesses, and factories, and

present the available evidence in a balanced manner. As discussed in the Draft's, Section 5.4.2 and the HRA Appendix, the Southern Ute—one of the four tribes that provided the Draft's formal case studies—used the bargaining power conferred by current tribal ROW policy to force companies to sell their existing gathering lines to them at concessionary prices. *See* § 5.4 below. Finally, the undue attention given to comments by BBC further reflects the lack of balance in the Draft.[20]

1.3.4. Uncertainty in Energy ROW Negotiations

The Draft states (without attribution) that tribal parties believe "imposition of a standard valuation methodology would result in great uncertainty about a tribe's ability to exercise self-determination and to manage its energy resources." Draft at 6. This assertion is baseless and should be removed from the Final Report for two reasons:

First, neither DOE/DOI nor the tribes offer any evidence to suggest that standardized valuation methods, which apply on every parcel of federal, state, municipal and private land in the U.S. (with the exception of tribal lands) have created significant uncertainty about these entities' rights to exercise self-determination and manage their energy resources. Universally throughout other U.S. lands, public policy dictates that when a utility undertakes a project for the public good, the fee it must pay for land usage rights is based on FMV. That is, the utility compensates the seller for the value of what the seller has lost in diminished land value resulting from installation and presence of the infrastructure, as opposed to the value to the general public from the infrastructure. This policy helps to ensure (1) that landowners do not successfully capture for their own benefit the aggregate public welfare benefit from the infrastructure and (2) that utility companies do not pay monopoly prices for land use rights. The system of providing perpetual ROW on private lands and transparent long-term ROW fee schedules on public lands reinforces the FMV standard by preventing infrastructure stakeholders from being repeatedly "held up" after they have already installed significant assets in or on the landowner's property. Unless the agencies can provide analysis to support its statements on self-determination and energy resource management, they should be deleted from the Final Report.

Second, the quoted comment recognizes that there is an economic link between tribal contributions in energy production and fee-setting policy on tribal ROW for pipelines and transmission lines. However, the Draft provides no evidence to support its implicit contention that the imposition of a standard valuation method for energy ROWs would somehow disrupt tribal energy supplies. In fact, the existence of ROW valuation standards and protection against exploitation of assets in the ground at renewal times would improve the incentives of inter- and intrastate pipelines and transmission lines to locate on tribal lands, improving access to this vital infrastructure for tribal importers and exporters. Moreover, the existence of these standards would

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significantly, electric generators. Oil gathering lines and oil transmission pipelines play similar roles to gas gathering lines and gas transmission pipelines, respectively.

[20] *See* Draft at 3.

increase the chances of consensual agreement but need only govern parties' transactions in the event that they cannot agree.[21]

1.3.5. Investment in Infrastructure

The Draft seeks to minimize the significance of the financial risk imposed by current ROW pricing policy on tribal lands by using data that are irrelevant, misleading or both. The changes that should appear in the Final Report include the following:

(1) The Draft states that "risks in the energy industry are widespread" and suggests that the Section 1813 study itself creates uncertainty. Draft at 7. The reference to the comments of the New Mexico Oil and Gas Association (NMOGA) regarding sources of risk in the energy industry misrepresents the clear meaning of the NMOGA's comments. As noted by NMOGA,[22] one purpose of the Section 1813 study is to *reduce* risk and uncertainty in the energy industry. It would be irrational to fail to address this significant policy problem either because it is only one of many risks. Reference to the comments of the Bill Barrett Corporation on uncertainty are illogical, irrelevant and should not be included in the Final Report.

(2) The Draft Report cites the results of a review of Securities and Exchange Commission (SEC) filings and notations of risk in those filings performed for the Ute Indian Tribe of the Uintah and Ouray Reservation. This citation should be eliminated from the Final Report for three reasons.

(a) The SEC filings do not cover ROW renewals on the horizon, only those that are currently under negotiation. Hence, this analysis is insufficiently forward looking to address the problem at hand.

(b) Even if no SEC filings categorized negotiation of tribal ROW as an issue material to the registrant's total assets, this information in and of itself sheds no light on the issue at hand. Tribal ROW fee increases are

[21] Condemnation or eminent domain power encourages negotiated (non-litigated) outcomes with the vast majority of private landowners. For example, EPNG, which has carried out eleven projects involving 2000 landowners in the last five years, has resorted to condemnation proceedings in only nine instances.

[22] "The one constant in New Mexico's oil and gas industry is its ever changing nature. Chances in financial markets and national and international policies and events have and continue to affect the industry. Additionally, fluctuating prices, supply, and demand contribute to the volatile nature of our industry. Part of that volatility is attributable to the uncertainty associated with oil and gas pipelines that cross tribal lands. This uncertainty is escalating as we see ever increasing financial demands placed upon oil and gas pipelines by tribal officials. For these reasons, we applaud Congress's desire to obtain from the agencies information upon which Congress might consider policies to bring about some stability in this segment of the industry." Comments of the New Mexico Oil and Gas Association 1 (Jan. 20, 2006) at 1.

only a risk to transporters to the extent that the costs cannot be fully passed on to ratepayers. However, even if consumers or ratepayers bore all the costs of ROW price increases, this would not make the current ROW pricing regime good public policy. As discussed above, for a current or proposed rule to be deemed good public policy, the costs of the rule must be outweighed by the benefits.

(c) The Draft Report presents an unbalanced view of the study's results. The finding that three of the 17 independent companies studied in the SEC filings analysis – nearly 20% -- listed negotiation of tribal ROWs as a material issue indicates that the issue is already significant, despite the fact that most renewals remain on the horizon.[23]

1.3.6. Potential for Uncertainty Related to Trespass Situations

The Draft erroneously minimizes the impact of the current tribal consent policy on transportation infrastructure and does not address how trespass actions enhance tribal bargaining power. In particular, the Draft Report notes that "Tribal parties stated that the industry parties pointed to no specific instances in which the statutory or regulatory requirements for tribal consent or delays in energy ROW renewals resulted in disruptions in energy delivery or threatened the reliability of the system." Draft at 8. This comment is misleading and should be eliminated because it suggests that the current policy has not *already* had a significant effect on the development of any energy infrastructure. The Sempra case study alone provides compelling evidence refuting this assertion. *See* § 1.3.2 above.

Moreover, tribes have also used the threat of trespass to effectively expropriate energy transportation facilities. As detailed in the Draft's appendix, this appears to have occurred in at least two cases: the Southern Ute's negotiations with El Paso Natural Gas (EPNG) involving EPNG's Colorado Dry Gas Gathering System and the Southern Ute bid for WestGas. *See* § 5.4 below.

Finally, such a statement does little, if anything, to address the real problem of ROW negotiations on tribal lands. Tribes have an incentive to protract negotiations to ensure that ROW holders become or remain in technical trespass. This tactic helps to ensure that tribes will be "fully" compensated for trespass situations by exacting payment for the trespass as part of the settlement. Regrettably, such conduct is not as atypical as the Draft would suggest to Congress.[24] In practice, tribes have no difficulty

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[23] *See* Supplemental Comments of the Ute Indian Tribe of the Ouintah and Ouray Reservation, June 26, 2006 at 9-10.

[24] *See especially* www.ilwg.org/Adobe%20pdf%20files/RegistrationPacket.pdf, Online Registration Packet for the Indian Land Working Group's 16th Annual Land Consolidation Symposium, to be held October 23-27, 2006 at Morongo Casino, Resort & Spa, Cabazon, California, October 23, 2006 Right Of Way Workshop Description

in bringing, and in fact do bring, trespass claims against energy ROW holders and threaten trespass proceedings against countless others.[25] To inform Congress otherwise is to turn a blind eye to the world of ROWs on tribal lands.

In order to properly evaluate the trespass issue in the Final Report, the agencies should advise Congress that trespass concerns are and remain a valid sub-issue with respect to acquiring consent to ROWs on tribal lands, and tribal trespass threats may be further tilting the already lop-sided negotiating leverage the tribes enjoy, under current policy, to extract consent payments far in excess of reasonable, FMV amounts. Simply because tribes may not ordinarily eject energy providers from their respective reservations does not mean that: (a) tribes forego seeking trespass damages during ROW negotiations or in court; (b) tribes will refrain from prolonging negotiations to create instances of trespass; or (c) energy providers should not be concerned that tribes will seek to be"fully [compensated] for trespass situations."

1.3.7. Cost to Customers

Although not properly recognized in the Draft, current ROW pricing policy on tribal lands significantly raises the costs of energy and energy transportation to impacted consumers. In order to address this concern, the following changes should be made in the Final Report.

(1) The Draft is remiss in its failure to analyze the claim that: "tribal parties asserted that rising energy costs were not the result of increases in energy ROW fees across tribal lands" is a red herring. Draft at 8. There is no dispute that factors in addition to tribal ROW fees are raising the cost of energy and transportation to consumers. However, there is also no dispute that tribal trust land ROWs can cost hundreds of times the amount that is actually required to make tribes whole for the installation and presence of America's critical energy infrastructure. Therefore, this assertion should be deleted in the Final Report.

(2) The Draft presents the results of three studies commissioned by tribes to measure the impact on consumer costs of energy ROW fees on tribal land. Draft at 8-9. Given the detailed analyses of the serious flaws in these studies provided in FAIR's Supplemental Report, the discussion of their results should be removed from the Draft

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("Discussion of case building for trespass or violations of rights-of-way involving utilities, . . . Right of Way Specialists share their case histories and current efforts.").

[25] *See, e.g., Washoe Tribe of Nev. and Cal. v. Southwest Gas Corp.*, 2000 U.S. Dist. LEXIS 7087 (D. Nev. January 12, 2000) (pipeline allegedly built outside of right-of-way); *United States v. Pend Oreille Public Utility Dist.*, 28 F.3d 1544 (9th Cir. 1994) (trespass action for inundation of tribal lands by public utility when tribe refused granting of right-of-way); *Northwest Pipeline Corp. v. 95-02 Acres of Land*, No. 01-628, at 3 (D. Idaho filed September 23, 2003) (right-of-way holder declared in trespass by Interior for constructing second pipeline along an existing easement).

and FAIR's rebuttal of these analyses should be fully presented. As discussed in the FAIR Supplemental Report, these studies focus on the issue of ROW renewal fees for *existing* pipelines and transmission lines on tribal lands. Therefore these analyses cannot remotely tell us whether current ROW policy on tribal lands is or is not costly from the perspective of consumers, because they do not address how current policy impacts transporters' investment incentives. Moreover, even on the issue of ROW renewal fees for existing pipelines and/or transmission lines, these various analyses are flawed and arrive at conclusions that are in conflict with one another. *See* FAIR Supplemental Report of June 16; Ex. B at10-12.

(3) The Draft includes FAIR's analysis of the impact of tribal ROW pricing on New Mexico consumers. Draft at 9. However, it inexplicably excludes the analysis of EPNG rate impacts submitted in FAIR's June 16 Supplemental Submission. In order to present an accurate picture of the costs to consumers, the following key findings of this analysis should be included in the Final Report:

> (a) To address the renewal cost pass-through issue, EPNG's ratemaking staff has quantified the impact of the Navajo ROW fee increase alone on its customers.[26] EPNG has determined that five Arizona customers would pay roughly 40% of each dollar increase in Navajo ROW costs.[27] These customers are Southwest Gas, Salt River Project Agricultural Improvement and Power District, Arizona Public Service, UniSource Energy, and New Harquahala Generation Company, LLC.[28]
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> (b) These ROW costs are clearly significant for many of EPNG's customers and can motivate these customers to undertake the economically wasteful activities that rate regulation of energy transportation facilities – like EPNG's pipeline – is expressly intended to

[26] Of course, this $22 million per year renewal fee is not the only ROW fee increase that EPNG and its customers are likely to face over the next 15 years. In that timeframe, EPNG must also renew ROW for its pipeline with numerous other tribes including the Laguna, Acoma, Southern Utes, Gila River Indian Community, and Tohono O'odham. These tribal ROW fess are expected to add many millions more to the ROW fees EPNG pays each year.

[27] This analysis relies on EPNG's RP05-422 rate filing cost allocation/rate design methods and levels of billing determinants, with one exception. Given that Southern California Gas Company transitions to discount rate contracts as of 9/1/06, the SoCal portion of recourse rate increase calculated using the rate case levels of billing determinants was spread to all other customers proportionate to their share of the total increase without SoCal. This analysis does not include an estimate of potential re-allocation resulting from Article 11.2 (rate cap) application.

[28] New Harquahala Generating Company LLC is a 1050 megawatt natural gas fired power plant in Maricopa County, Arizona.

prevent. In particular, the tribes' ability to pass through monopoly ROW fees to LDCs that serve millions of final consumers provides those LDCs with incentives to seek gas deliveries from alternative sources that would be more costly, but for the ROW fees imposed by the tribes.

(c) Many of EPNG's customers purchase gas from other pipelines such as Transwestern that also face potential ROW cost increases in the near term. In addition, a number of these companies face tribal land fee increases for ROW required by their existing pipeline and transmission lines, a fact completely ignored by the tribes' experts.

1.3.8. Standards for Valuing Energy ROWs on Tribal Land

Without providing any critical analysis of which valuation standard(s) are appropriate, the Draft merely summarizes the positions of the tribes and industry representatives. Draft at 9-10. What is clearly missing from this section, and § 4.1 below, is any real analysis of which standards *should* be employed to effectuate the clear policy of the President and Congress of establishing reliable and affordable energy for all Americans. *See* § 3.2 below. In order to provide the analysis Congress requested in the Final Report, it is incumbent on the agencies to explain what standard(s) are presently used by sovereign entities for valuing ROWs. As explained in § 4.1 below, there is considerable evidence to suggest that Congress, the tribes, and the states use fair market value methodologies to the value of property taken (or the diminished value of property used) by the relevant sovereign for public use, including energy transportation ROWs.

2. Negotiations for Energy ROWs on Tribal Land and the Implications for Tribal Self-Determination and Sovereignty

2.1. Statutory Background

The Draft fails to address significant issues of statutory construction and intent and thereby fails to provide Congress with "an assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy ROWs on tribal land." EPAct § 1813(b)(3). In particular, the Draft Report fails to address the threshold question of whether Congress intended to extend the tribal consent requirement to *all* tribes based solely upon imposition of such a requirement for *only* IRA tribes in the General Right-of-Way Act of 1948 ("1948 Act").

With scant attention to either statutory construction or legislative intent, the Draft concludes: "when read together, the statutes empower the Secretary to require tribal consent for a tribe organized under the tribal organization statutes, and they vest the Secretary with the discretion to mandate tribal consent and other conditions, for ROWs across lands of other tribes." Draft at 13. This conclusion is not correct.

Rather, a consideration of the statutory language, legislative intent, and canons of statutory construction indicate that Congress never intended for the consent provisions of the 1948 Act to apply to non-IRA tribes. *See* Ex. A at 1-4. Accordingly, the Final Report should be corrected to include a proper statutory analysis.

2.2. Regulatory Background

The Draft does little more than parrot the existing DOI regulations involving tribal ROWs and entirely fails to address the fundamental reality that these regulations exceed the 1948 Act's grant of authority. As discussed in the Introduction, three important points regarding the scope of DOI's consent regulations should be discussed in the Final Report.

First, DOI in its rulemaking capacity may neither interpret the IRA to include non-IRA tribes – by ignoring Congress' statutory distinction between the two classes of tribes – nor may the Department extend the provision of the 1948 Act to all other ROW statutes. The plain language of the 1948 Act provides that "no grant of a right-of-way over and across any lands belonging to a tribe organized under the [IRA] shall be made without the consent of the proper tribal officials." *See* 25 U.S.C. § 324. Where, as here, the statute specifically "names the parties who come within its provisions, other unnamed parties are excluded." *See Foxgord v. Hischemoeller*, 820 F.2d 1030, 1035 (9th Cir. 1987); *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) ("The doctrine of *expressio unius est exclusio alturius* 'as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions'") (citations omitted). Thus, the plain language of the 1948 Act dictates that consent is only required of those tribes organized under the IRA. Consent is not required for tribes that are not so organized. Extension of such regulations to non-IRA tribes is arbitrary, capricious, an abuse of discretion, and not in accordance with the law. *See* 5 U.S.C. § 706(2)(A).

Second, the Draft fails to address whether it was appropriate for DOI in its regulations to apply the requirement of tribal consent to the renewal of ROWs when tribal consent had already been obtained when the ROWs were originally granted. *See* 25 C.F.R. § 169.19 (renewal of a ROW may only be granted "with the consent required by § 169.3…"). Given that the tribal sovereignty considerations are less acute at the renewal stage than at the initial grant stage, the Final Report should address this important distinction and present Congress appropriate options for leveling the playing field for the renewal of energy ROWs. *See* Ex. A at 4- 5.

Third, the Draft fails to address the important issue of ROW duration under DOI's regulations and practice. In particular, there is presently a substantial incongruity between the language of DOI's ROW regulations, which provide that ROWs for both electric transmission lines and oil and gas pipelines may be "without limitation as to term of years," *see, generally*, 25 C.F.R. § 169.1, and DOI's practice of limiting such ROWs to a term of 20 years or fewer. The Final Report should address this capricious incongruity between regulation and practice within DOI, and should

present Congress options concerning the benefits of longer-term energy ROW consent arrangements. *See* Ex. A at 5.

2.3. Federal Policy of Tribal Self-Determination

The Draft would have Congress believe that the policies underlying the IRA and the Indian Self-Determination and Education Assistance Act[29] must drive all decisions respecting ROWs and ROW statutes applicable to tribal lands. The Draft Report should properly present both sides of the issue to Congress.

One of the crucial omissions of the Draft Report is that it fails to explain that tribes no longer possess the full attributes of sovereignty.[30] To the contrary, tribal sovereignty is dependent upon, and subordinate to, the Federal Government.[31] Congress has the power not only to enact the IRA and other statutes expressing a "policy" of respect for tribal culture, rights, and traditions, but to substantively alter or restrict any retained sovereignty the tribes may possess.[32] Congress is not limited by any "policy" of its own creation or, for that matter, any "policy" expressed by the Executive Branch. Congress is perfectly free to carry out its responsibility under Article I of the United States Constitution to legislate, and it may do so by *balancing* tribal self-determination policies with other national interests and policies, including national energy policies. *See* Ex. A at 6-7.

Moreover, Congress may diminish tribal lands and powers by statute, and such statutes must be interpreted to implement Congress' clear intent.[33] By failing to address Congress' options to balance self-determination policy with compelling policies to facilitate the transport of critical energy resources, the Draft Report does not articulate the basis upon which Congress may undertake the options delineated in Section 4.4 of the Draft. The Final Report should properly explain the limits of tribal sovereignty and self-determination, including Congress' plenary authority over tribes, and provide Congress with the full range of options consistent with Congress' authority in this area. *See* Ex. A at 6.

2.4. The Issue of Consent and Implications for Tribal Sovereignty

The Draft presents an incomplete and misleading view of tribal sovereignty. In so doing, the Draft fails to meet its statutory responsibility to make recommendations to

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[29] Act of January 4, 1976, 88 Stat. 2203, codified at 25 U.S.C. §§ 450, *et seq.*

[30] *See Santa Clara Pueblo v. Martinez*, 536 U.S. 49, 55-6 (1978).

[31] *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

[32] *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979).

[33] *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 357.

Congress that are cognizant of Congressional authority to legislate in the area of energy rights-of-way on tribal land. According to the Draft, "[t]he principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of consent. A tribe's authority to confer or deny consent to an energy ROW across tribal land derives from its inherent sovereignty…". Draft at 14. This conclusion fails to address at least three fundamental limitations on tribal sovereignty.

First, Congress has plenary authority over Indian affairs. The ultimate control and exclusionary power over tribal lands is committed to Congress and to the Secretary of the Interior in the exercise of his or her delegated authority – not to the Indian tribes themselves. Cohen's Handbook of Federal Indian Law § 4.01[2][e] at n. 141 (2005 ed.) For example, tribes are not permitted to grant ROWs or other interests in their lands unless ratified by the Secretary or authorized to do so by Congress.[34] In turn, Congress has chosen to delegate to the Secretary, and not to the tribes themselves, the power to issue ROWs on tribal lands. The Secretary grants ROWs to non-Indians under directives of Congress.[35] Moreover, when Congress enacts a ROW statute that does not require tribal consent, as it has done in all general ROW statutes except for the IRA provision of the 1948 Act, tribes are without the power to exclude the ROW holder because Congress has determined tribal consent to be unnecessary.[36] The Final Report should properly inform Congress of both the genesis and the limits of tribal sovereignty in order to allow Congress to better assess the array of legislative options before it. *See* Ex. A at 7.

Second, some of the tribes have entered into treaties which specifically express the tribe's continuing consent to ROWs across their reservations under certain circumstances. In such cases, the treaties both delineate and circumscribe the tribe's sovereignty by explicitly granting prospective consent for certain infrastructure ROWs. In interpreting these treaty provisions, the Supreme Court has affirmed that the tribes' consent to federally-ordered works of utility in particular treaties permit utilities to cross their reservations without further authorization.[37] Congress should be informed in the Final Report that certain treaties unquestionably permit the construction of utilities across tribal lands without relevant tribal consent. *See* Ex. A at 9-10.

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[34] *See* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").

[35] *See, e.g.,* 25 U.S.C. § 323 ("[t]he Secretary . . . is hereby empowered to grant rights-of-way . . . ."); 25 U.S.C. § 321 ("[t]he Secretary . . . is authorized and empowered to grant a right of way . . . .").

[36] *See Quechan Tribe v. Rowe,* 531 F.2d at 411.

[37] *See, e.g., United States v. Andrews,* 179 U.S. 96, 99 (1900) ("[The Chisolm] trail . . . would certainly be a work of utility or necessity within the meaning . . . of the treaty.").

Third, the Draft fails to discuss those situations where tribes voluntarily relinquish some elements of their sovereignty in exchange for other benefits, such as contractual arrangements for economic gain. Indeed, tribes are often willing to exchange or modify their sovereignty when market conditions make it necessary or desirable for them to do so. For example, tribes on many occasions: (i) waive sovereign immunity, defer or relinquish taxing authority, and grant land use privileges as part and parcel of mineral development agreements entered into pursuant to the Indian Mineral Development Act ("IMDA");[38] and (ii) enter into gaming compacts that require sovereign immunity waivers, application of state law, income sharing, and other dilutions of sovereign powers.[39]

The primary difference between the cases in which tribes have willingly circumscribed their sovereignty and the case of energy ROWs is that in the latter case, the tribes often possess monopoly power over the economic subject at issue: a discrete geographic path through which energy infrastructure must pass. The Final Report should consider these other examples as templates of how the undeniable need for energy ROWs and important principles of tribal sovereignty can be reconciled to the mutual benefit of tribes and industry, as well as to the aggregate benefit of the United States. *See* Ex. A at 8-9.

3. National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy ROWs on Tribal Land

As a threshold matter, Chapter 3 of the Draft reads more like a continuation of Chapter 2's essay on tribal sovereignty than an attempt to address a separate request from Congress to provide "an analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy ROWs on tribal lands." EPAct § 1813(b)(4). In short, paragraph (4) calls on the Departments to identify national energy transportation policies that have a bearing on, or are directly implicated by, grants, expansions, and renewals of energy ROWs on tribal land. This paragraph was not designed to be a regurgitation of paragraph (3)'s discussion of tribal sovereignty considerations. The Draft's failure to answer the question specifically presented by Congress needs to be corrected in the Final Report in order for the Departments to fulfill their charge from Congress.

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[38] Act of December 22, 1982, 96 Stat. 1938, codified at 25 U.S.C. §§ 2101-2108. Waivers of sovereign immunity in IMDA agreements take place under the requirements of 25 C.F.R. § 225.21(b)(13), which requires that such agreements contain "[p]rovisions for resolving disputes."

[39] *See Tribal –State Gaming Compact between the Fort Mojave Indian Tribe and the State of California*, available at http://www.cgcc.ca.gov/compacts.html; and *Indian Tribe –State of Arizona Gaming Compact*, available at http://www.gm.state.az.us/compacts.htm.

Among the national energy transportation policies that deserve careful analysis in the Final Report are the following:

(1) Implementation of the President's national energy plan. This includes decreasing America's reliance on imported oil and gas by increasing domestic production and by modernizing and expanding America's inadequate energy infrastructure. *See* § 3.1 below.

(2) The creation of national energy corridors under EPAct2005. Congress has undertaken several initiatives to reduce the siting obstacles faced by electric transmission lines, natural gas pipelines, and other types of energy transportation infrastructure. For example, Section 1221 of EPAct2005 directs the DOE to designate National Interest Electric Transmission Corridors in any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers.[40] Section 368 of EPAct2005 is another key Congressional initiative designed to ease the siting of energy transportation infrastructure, particularly in the West. Section 368 creates national energy corridors on federal lands in the Westin order to reduce regulatory hurdles to the siting of energy transportation infrastructure. Although the corridors currently stop at the borders of tribal lands, it is important to recognize that their efficacy in easing siting constraints will be significantly constrained by current tribal ROW policy.[41]

As discussed in detail above, under current tribal ROW pricing policy, tribes have both the ability and the incentive to charge companies just below build around costs for ROW "consent." The full cost of crossing tribal land under an FMV pricing standard would be the cost of constructing pipelines or transmission lines by taking the most prudent, cost-effective route across tribal lands, along with the FMV price for the route. The build around cost would be the cost of building pipes and/or transmission lines taking the best possible route around tribal lands, along with an FMV price for the land along the longer route. Hence, the loss from current policy can be calculated by subtracting the former cost from the latter.

The final DOE/DOI Report should provide the expected impact of current tribal ROW fee policy on these corridor costs. In the absence of such information, we consider the impact of current tribal ROW fee policy on the price that companies would pay to use a new U.S. government energy corridor across the Navajo Nation. Assuming that the corridor required to traverse the Navajo Nation is 800 miles long, the magnitude of ROW fees that would need to be paid to the Navajo Nation for this corridor can be estimated using current per mile tribal ROW rates. To determine the corridor cost, we apply the current Navajo ROW rate of $24,000 per mile (over an assumed 100 foot easement width) to a corridor that is 800 miles long and one mile

[40] *See* § 3.2.

[41] The tribes are also clearly aware of this issue, *see, e.g.*, http://www.ens-newswire.com/ens/nov2005/2005-11-16-03.asp

wide.[42] Using these figures, we find that the total cost of the corridor across the Navajo Nation would be over $1 billion per year. Even if the FMV for a perpetual easement on this land cost $1 billion, the calculated corridor figure is still many billions of dollars greater because it represents a fee that must be paid every year, for decades to come. Moreover, this $1 billion annual figure could well be a conservative estimate of the cost because the current tribal ROW demands do not yet appear to fully reflect energy transporters' build around costs.

Consistent with the Draft's failure to consider the conflicts between the current tribal ROW policy and other policies that impact national energy transportation, many of the conclusions in § 3.1 are overly simplistic in their assumption that tribal decision-making does and should trump all other national energy transportation policies. For example, within the space of two short paragraphs, the Draft alleges "[o]verall, the policies put in place by Congress and the executive branch strongly support tribal decision-making regarding energy ROWs on tribal lands" and "[a]lthough expressed in much more general terms, these policies support tribal decision-making and tribal involvement in energy matters." Draft at 15. Contrary to these blanket conclusions, however, the issues of tribal sovereignty and self-determination are not absolute principles which supersede all other national priorities. *See*, *e.g.*, §§ 2.1- 2.4 above; Ex. A at 10-11.

To correct the Draft's s one-sided and unsupported conclusions in Ch. 3, the Final Report should discuss the following facts and considerations:

(1) The Departments of Energy and the Interior strongly support the President's national energy policies.

(2) Tribal decision-making involving energy ROWs is subject to the ultimate will of Congress. Tribal authority has been limited in the past through statutes and treaties, and it can be further modified in the future to accommodate the overriding national interest of providing affordable and reliable energy to all Americans, including Native Americans. *See* Ex. A at 10-11.

(3) Holders of energy ROWs on tribal lands have legitimate expectations based on existing contractual rights, and they have reasonably relied on those rights in maintaining, developing, operating and expanding existing infrastructure dedicated to the public interest. Companies have been operating for decades in the same right of

[42] This calculation was based on the current Navajo ROW rate of $24,000 per mile annually over an assumed 100 foot easement width. Assuming a corridor that is 800 miles in length and one mile wide the total cost of the corridor would be over $1 billion annually. The one mile corridor width was the minimum width suggested by commenters for a mixed-use corridor should be as discussed on p. 7,"Summary of Public Scoping Comments for the Programmatic Environmental Impact Statement, *Designation of Energy Corridors on Federal Land in the 11 Western States (*DOE/EIS=0386)", DOE/DOE, February 2006.

way following their investment of millions of dollars in constructing, maintaining and expanding pipeline and transmission systems to provide an adequate and stable supply of energy to residential, commercial, governmental and tribal end-users. Nothing in the 1948 Act or its implementing regulations authorizes the "Secretary to disregard or sweep aside legitimate existing contractual" or business expectations of these companies. *Woods Petroleum Corp. v. U.S. Dept of the Interior*, 18 F.3d 854, 858 (10th Cir. 1994), *op. adhered to on reh'g*, 47 F.3d 1032 (10th Cir. 1995). When under the 1948 Act the Secretary determines just compensation, he must consider the decades of investment, reliance and expectations of companies with infrastructure in place on tribal lands.

(4) If Congress does not take action, impasses will greatly increase between ROW holders/applicants and tribes. These impasses will threaten the expectations of all Americans for affordable and reliable sources of energy. *See* Ex. A at 11.

3.1. National Energy Transportation Policies Directly Relevant to Energy ROWs on Tribal Land

It is extremely disappointing that the Departments have completely ignored the Administration's important policies promoting national energy independence in evaluating the overall impacts of current tribal ROW policy.

First, the Draft fails to recognize how tribal ROW policy undermines the President's goal of strengthening domestic energy sources, stated in his January 21, 2006 State of the Union Address and elsewhere. As discussed above, current tribal ROW policy offers a Hobson's choice to energy transporters seeking to provide their customers with access to lower cost, reliable energy resources. Either these transporters must: (i) incur the potentially enormous expense associated with building around tribal lands or (ii) cancel their projects, regardless of the value that these projects would provide to consumers if tribal lands were subject to FMV-pricing standards. Just as egregiously, current policy allows tribes to renew ROW for plant already located on tribal lands at fees that are hundreds of times the costs that tribes incur through providing these ROW. As noted above, increased ROW fees for existing pipelines could be significant enough to drive LDCs to purchase liquefied natural gas (LNG) from foreign sources rather than domestically produced natural gas,[43] and there are over 30,000 miles of gas and electric transmission lines alone that are currently located on tribal trust lands, as shown in Table 1.

[43] As the President noted in his State of the Union address, "Keeping America competitive requires affordable energy. And here we have a serious problem: America is addicted to oil, which is often imported from unstable parts of the world….another great goal: to replace more than 75 percent of our oil imports from the Middle East by 2025. By applying the talent and technology of America, this country can dramatically improve our environment, move beyond a petroleum-based economy, and make our dependence on Middle Eastern oil a thing of the past."

Second, the Draft Report cites *The National Energy Policy, Chapter 7, America's Energy Infrastructure, A Comprehensive Delivery System*, almost in passing. Draft at 18. The National Energy Policy is replete with declarations calling for more infrastructure, dependable transportation, increased capacity, and consistent federal policies. A disinterested reader of the Draft Report would never know that. Congress would clearly benefit from a Final Report that gave the same energy, focus, advocacy, and analysis to President Bush's own national energy policies as it gave to considerations of tribal sovereignty and self-determination. Such an analytical balance would necessarily capture the interdependent public policy issues presented and would serve the Congressional purpose in accurate law-making. Simply put, the Final Report should evaluate current tribal ROW policies more fully through the lens of the President's energy policy. A logical starting point is the National Energy Policy itself, including some of its more salient statements, which follow:

Report of the National Energy Policy Development Group, May 2001
America's Energy Infrastructure -- A Comprehensive Delivery System

"The United States needs to modernize its energy infrastructure. One sign of a lack of energy policy in recent years has been the failure to maintain the infrastructure needed to move energy where it is needed most." Chapter 7, p. 1.

"Coal, natural gas and oil powered plants require dependable transportation infrastructure to deliver the fuels necessary for the production of electricity." Chapter 7, p. 1.

"Virtually all natural gas in the United States is moved via pipeline. The current domestic natural gas transmission capacity of approximately 23 trillion cubic feet will be insufficient to meet the projected 50 percent increase in U.S. consumption projected for 2020. Chapter 7, p. 11.

"An additional 263,000 miles of distribution pipeline and 38,000 miles of new transmission pipeline will be necessary to meet increased consumption and the new geographic realities of supply and demand." Chapter 7, p. 12.

"Consistent federal, state, and local government policies and faster, more predictable regulatory decisions on permitting for oil and natural gas pipelines are needed to enable timely and cost effective infrastructure development." Id.

"Regional shortages of generating capacity and transmission constraints combine to reduce the overall reliability of electric supply in this country and are reducing the quality of power delivered to end users Chapter 7, p. 6

"Growth in peak demand for electricity has far outstripped investment in transmission capacity. As a result, transmission constraints could aggravate already limited supplies of power and could result in high prices in some areas of the country. Chapter 7, p.7.

Third, the Departments completely ignored the President's Advanced Energy Initiative – a profoundly important policy initiative by the Administration that will clearly be needlessly burdened by the current tribal ROW policy. The Departments should take a close look at the President's Advanced Energy Initiative in the Final Report and carefully weigh the impact of tribal ROW uncertainties on that key Initiative. Among the considerations addressed in the Final Report should be the following policy concepts taken from the White House website:

> **Today, President Bush Discussed The Advanced Energy Initiative (AEI) – A Comprehensive Vision For A Clean, Secure Energy Future.** The President's Advanced Energy Initiative promotes America's four main sources of electricity: coal, nuclear, natural gas, and renewable sources.
>
> **To Continue Economic Growth In A Competitive World, America Must Find Solutions To Its Energy Needs.** Over the past 30 years, our economy has grown three times faster than our energy consumption. During that period, we created more than 55 million jobs, while cutting air pollution by 50 percent. But America's dynamic economy is also creating a growing demand for electricity; electricity demand is projected to increase nearly 50 percent over the next 25 years.
>
> **As The Global Economy Becomes More Competitive, America Must Find New Alternatives To Oil, Pursue Promising New Technologies, And Find Better Ways To Generate More Electricity.** America faces new energy challenges as countries like China and India consume more energy – especially oil. Global demand for oil is rising faster than global supply. As a result, oil prices are rising around the world, which leads to higher gas prices in America.
>
> **The President Is Working To Meet America's Energy Demands And The Challenges Of The Global Economy By Developing Clean, Domestic, Affordable Supplies Of Energy.** We must safeguard the environment, reduce our dependence on energy from abroad, and help keep prices reasonable for consumers.

3.1.1. Indian Right-of-Way Act of 1948 and Implementing Regulations

As discussed in FAIR's responses to Ch. 2 above, the Draft Report overlooks key limitations in the 1948 ROW statute and fails to consider whether DOI's broadly-worded regulations are lawful in the light of these statutory limitations. *See* §§ 2.2 – 2.3 above; Ex. A at 1-5. Moreover, the Draft Report's repeated reliance on a 1969 House Committee Report's citation of a subcommittee staff member's memorandum demonstrates – palpably – the slim statutory reed on which DOI's regulatory edifice in this area is founded. The Draft Report's conclusion that DOI's implementing regulations are supported by the 1948 Act, Draft at 16, suffers from at least two fatal flaws.

First and most importantly, the 1969 subcommittee staff memorandum simply does ***not*** say what the Draft suggests. The House Committee on Government Operations recommended that the 1948 Act be amended to: (i) address any and all tribes, and thereby remove the plain distinction between IRA and non-IRA tribes; and (ii) make tribal consent a requirement under all tribal land ROW statutes.[44] This recommendation was never adopted by Congress. In H.R. Rep. No. 91-78, the Committee recommended that consideration be given to changing the 1948 Act "to read as follows (add italicized words and delete words struck through):"

> Sec. 2. No grant of a right-of-way over and across any lands belonging to ~~a~~ *any* tribe ~~organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967);~~ shall be made *pursuant to this or any other act of Congress* without the consent of the proper tribal officials or, *if the Secretary of the Interior certifies that the tribe has no tribal officials, the approval of a majority of the adult members of such tribe*.

Id. at p. 19 (internal footnote omitted). Congress rejected the proposal and declined to amend the 1948 Act to extend its consent requirement coverage to non-IRA tribes and to other ROW statutes.

Second, even assuming the 1969 subcommittee staff memorandum (not "Congress") "approvingly cited" adoption of Interior's 1948 Act interpretation (which it does not) "the authoritative statement is the statutory text [of the 1948 Act], not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs, Inc.*, 125 S. Ct. 2611, 2626 (2005) ("[R]eliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresented committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.). Such, as is explained *infra*, is the case with the Report. The thoughts of House subcommittee staff, even if it is adopted by a House Committee, on a possible amendment to the 1948 Act which was never even introduced in Congress are meaningless, and cannot be used either to override the plain language of the 1948 Act

[44] *See* H.R. Rep. No. 91-78 at 19.

or to validate Interior's regulations expanding the Act's coverage and impact on energy ROWs.[45]

In sum, the Final Report should accurately inform Congress of the fact that Congress considered amending the 1948 Act as proposed by the 1969 House Committee Report, but no bill was introduced and no legislation resulted. Moreover, the fact that Congress has not done so in the intervening 37 years strongly indicates that Congress is satisfied with the law as written.[46] In sum, Congress has never "approvingly cited" Interior's construction and has never indicated support for the tribal consent requirement.[47] *See generally* Ex. A at 11-13.

3.1.2. Historical Energy ROW Statutes and Regulations

The Draft disregards historical precedent and concludes incorrectly that it has been the customary practice of DOI to acquire tribal consent prior to the issuance of a ROW by the Secretary, regardless of whether the relevant ROW authorizing statute required such consent. Draft at 13. This is simply incorrect. The Final Report should accurately reflect that DOI has repeatedly taken the position--including in 1934, 1936, 1952, and 1968—that the tribal consent requirement does not extend to non-IRA tribes or to other ROW-authorizing statutes that do not by their terms require such consent. *See* Ex. A at 13-14.

3.2. General Policies Relating to Energy Matters on Tribal Land

Rather than engage in careful analysis of concrete policies actually articulated by Congress in last year's EPAct of 2005, the Draft offers a platitude, stating that the

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[45] *See Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 531 U.S. 159, 169-70 (2001) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute…[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others.") (internal quotes and citations omitted); *see also Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1071 (6th Cir. 1997) (noting that "statements made by persons in favor of a rejected or failed bill are meaningless and cannot be used as an extrinsic aid"), *cert. denied*, 520 U.S. 320 (1997), *overruled in part on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997).

[46] *See Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. at 772 ("Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses…absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.") (citation and internal quotation omitted).

[47] This is especially true in light of Congress' understanding of Interior's view of the 1948 Act. *See* H.R. Rep. No. 91-78 at 40-41 (noting that "it has always been understood . . . by officers of the Department . . . that the Secretary has the authority, regardless of the regulations, to grant [ROWs] on his own initiative in the case of tribes not organized under the [IRA]).

agencies find "a continuing pattern of working cooperatively with tribal governments and with tribal consent." Draft at 17. The Final Report should include a discussion of the President's own national energy policy as well as several national energy policies which were included in the 2005 EPAct, and analyze how these policies are affected by the present method of obtaining, and renewing energy ROWs on tribal lands.

First, Title V of the EPAct of 2005 established the Office of Indian Energy Policy and Programs within DOE for the express purposes of promoting tribal energy development, efficiency and use; reducing and stabilizing energy costs; enhancing Indian tribal energy and economic infrastructure; and bringing greater electrical power and service to Indians.[48] Title V also amended the Indian Energy Act ("IEA"), directing the Secretary to "establish and implement an Indian energy resource development program to assist consenting Indian tribes and tribal energy resource development organizations in achieving the purposes of this title."[49] One of the stated purposes of the IEA amendment is to assist tribes in "carrying out projects to promote the integration of energy resources, and to process, use or develop those energy resources on Indian land[.]"[50] Congress defined the phrase "integration of energy resources" as "any project or activity that promotes the location and operation of a facility (including any pipeline, gathering system, transportation system or facility, or electric transmission or distribution facility) on or near Indian land to process, refine, generate electricity from, or otherwise develop energy resources on, Indian land."[51] Finally, Title V sets parameters by which tribes can enter into Tribal Energy Resource Agreements and assume BIA's role in reviewing and approving ROWs related to an energy project on or near tribal land.

It strains credulity to conclude that, in one breath, Congress would promote the reduction and stabilization of energy costs, and in another, continue a system that allows tribes to charge exorbitant ROW fees that increase those very same costs to off-reservation and on-reservation users alike. Equally disjointed is the notion that while encouraging integration of energy resources on tribal lands, Congress should enable tribes to price themselves out of contention for those facilities and thereby defeat Congress' purpose. And, if tribes are to assume roles of both negotiating and approving ROWs, it is imperative that a standard be prescribed to guide their approval actions and a procedure be put in place to apply that standard. In sum, provision of power, services and regulatory authority to tribes will not and cannot improve if utilities and developers locate elsewhere. The Draft Report should be revised to take notice of the national energy policy stated in Title V of the 2005 EPAct. *See* Ex. A at 14-16.

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[48] *Codified at* 42 U.S.C. § 7144e.

[49] 25 U.S.C. § 3502(a)(1).

[50] 25 U.S.C. § 3502(a)(2)(B).

[51] 25 U.S.C. § 3501(5).

Second, EPAct 2005 Section 368, Congress expressly stated its desire to have designated national energy corridors.[52] Although by the express language of Section 368, the designations apply only to "[f]ederal land in the eleven contiguous Western States[,]"[53]the energy corridors that Congress ordered be designated, and the pipelines and transmission lines they will contain, must, by necessity, be continuous "lines." Moreover, it is plain from a review of the proposed corridor maps[54] that the corridors as presently configured will cross tribal lands. If tribes are permitted to withhold their consent to the construction of corridor segments crossing their lands, they will confound the intent of Congress and will unilaterally undermine Congress' admonition to the Secretaries of Agriculture, Commerce, Defense, Energy and Interior to "expedite applications to construct or modify oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities within such corridors . . . ."[55] In the event tribes can withhold their consent or hold energy projects hostage for unreasonable ROW fees, they will frustrate the Secretaries' individual and collective duties to consider the need for new and upgraded electricity transmission and distribution facilities to "(1) improve reliability; (2) relieve congestion; and (3) enhance the capability of the national grid to deliver electricity."[56]

Third, EPAct 2005 Section 1221 amends the Federal Power Act,[57] directing DOE to designate National Interest Electric Transmission Corridors in any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers.[58] Among other factors, DOE is to consider whether the economic vitality and development of the corridor or end markets served by the corridor may be constrained by lack of adequate or reasonably priced electricity, and whether the designation would be in the interest of national energy policy.[59]

If an applicant for an Electric Transmission Corridor cannot obtain agreement for land to construct or modify a transmission facility, the amendment provides for the power of eminent domain, and the payment of just compensation in an amount equal to the fair market value (including applicable severance damages) of the property taken on

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[52] *Codified at* 42 U.S.C. § 15926

[53] 42 U.S.C. § 15926(a)(1).

[54] Individual state corridor maps are available at: http://corridoreis.anl.gov/news/index.cfm#statepdmap.

[55] 42 U.S.C. § 15926(c)(2).

[56] 42 U.S.C. § 15926(d).

[57] *See* 16 U.S.C. § 824, *et seq*.

[58] *Codified at* 16 U.S.C. § 824p. *See also* U.S. Department of Energy National Electric Transmission Congestion Study, August 2006 at 45-6 (describing San Diego's "acute" transmission problems due to limited points of electric import deliveries).

[59] *See* 16 U.S.C. § 824p(a)(4).

the date of the exercise of eminent domain authority.[60] It is plain that this national energy policy cannot proceed if a tribe is empowered to withhold its consent to a ROW even when it is clear that a tribe's withholding of consent will unreasonably have adverse effects on consumers.

In sum, the 2005 EPAct articulated a clear set of policies aimed at enhancing energy infrastructure, expanding service, and increasing reliability and reducing costs to all American consumers, including Indians and tribes. The Final Report should discuss these policies and explain how such policies may be frustrated by the current regime of unfettered tribal consent for energy ROWs. *See* Ex. A at 14-16.

3.2.1. Emergency Authorities
3.2.2. Executive Branch Policies

4. Issues for Stakeholder Consideration Concerning Standards and Procedures for Negotiation and Compensation for Energy ROWs on Tribal Land

4.1. Valuation Methods and Negotiations Regarding Energy ROWs on Tribal Land

The Draft Study notes that "In the existing statutory and regulatory process the value of a grant, expansion or renewal of an energy ROW on tribal lands is determined through negotiations between an Indian tribe and an energy company." Draft at 20. It then lists 12 methods (many of which are redundant) that tribes have used "in their negotiations for appropriate compensation for energy ROWs on tribal lands." *Id.*

However, this description is misleading because it obscures the crucial point that under current ROW pricing policy on tribal lands, the *only* practical constraint on the ROW "consent" fees that a tribe can charge to a regulated energy transporter is the company's cost of building around the tribe's land. Thus, current policy on tribal lands provides tribes with both the ability and the incentive to extract from regulated energy transportation providers the entire public benefit arising from these facilities crossing tribal lands. To paraphrase Mae West, for many of the tribes that have developed a cottage industry in this public policy failure, "Too much of a good thing is still a good thing."

The Departments have an obligation to Congress and to the public at large, to disclose in the Final Report the widespread convergence – as expressed in the codified procedures of the federal government, the states, and the tribes themselves – on traditional notions of fair market valuation as the "best practice" for compensating landowners for the use of their lands dedicated to the public interest. In particular, this section of the Final Report should be rewritten to highlight the fact that federal, state,

[60] *See* 16 U.S.C. § 824p(e) & (f).

municipal and private landowners, adhere to FMV standards for ROW across their lands. For example, the states containing the majority of the tribal land in the Western United States – California, Arizona, New Mexico, Colorado, Wyoming, and Idaho – all use FMV-based standards for valuing ROWs within their borders. *See* Ex. C..

Moreover, it is imperative that the Final Report explain to Congress that the tribes *themselves* use a FMV methodology when determining what compensation is due their own tribal members for property taken pursuant to the tribes' domestic eminent domain statutes. *See* Ex. D. Similarly, Congress established FMV as the accepted standard of compensation for Indian lands under the Indian Claims Commission Act and other pertinent statutes. *See* Ex. E. Accordingly, the Final Report must fairly apprise Congress that both Congress and the tribes themselves have determined that FMV is the appropriate standard for valuing tribal or other Indian lands dedicated to public use.

4.2. Summary of Comments

The following changes to this section should be made in the Final Report:

(1) The Draft states that "some energy companies commented that limiting energy ROW negotiations to market value would restrict creative arrangements that promote development of energy resources on tribal lands." FAIR does not propose to "limit" negotiations to FMV, nor do any of the policy options that the Draft Report provides for Congress to consider. Rather, FAIR contends that a standard must be available to guide discussions and serve as a fall-back option, if negotiations fail.

(2) In addition, as noted above, the argument that energy production will be impeded if ROW policy on tribal lands is changed in a manner that provides inter- and intrastate pipelines and transmission lines with more economic access to tribal lands is flawed and should be eliminated. *See* § 1.3.4 above.

(3) Market principles can and should be used to value ROWs on tribal land. As explained in § 4.1 above, there is considerable evidence of Congress, the tribes, and the states use FMV-based standards to assess the value of property taken by the relevant sovereign or its agents, in this case energy transporters, for public use, including energy ROWs. The agencies have an obligation to disclose this fact in the Final Report. Moreover, given this backdrop, the agencies should make clear in the Final Report that tribes bear a heavy burden to demonstrate why FMV principles should not be applied to pricing energy transportation ROWs.

(4) The Draft suggests high ROW fees may be justified because municipalities impose similarly high fees. However, even leaving aside the scant and unreliable evidence assembled to support this claim, case law establishes that municipalities may not charge extortionate right-of-way fees. *See, e.g., AT&T Co. v. Village of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993) (where "[a]ll that plaintiffs seek here is to get from one side of town to the other," municipality could not charge unreasonable toll for use of public streets and "hold the public streets hostage as a means of raising revenue"); *see also Williams Comm., Inc. v. City of Riverside*, 8 Cal.

Rptr. 3d 96, 107 (Cal. Ct. App. 2003) (where utility sought to install conduit and cable in city streets as part of a statewide and nationwide network, municipality could not charge rent or an unreasonable easement or license fee in consideration for use of those streets). These limitations on municipalities' ability to charge unreasonably high right-of-way fees clearly undermine the Draft's position and warrant an FMV-based fee for the passage through tribal land.

(5) The Draft states that "[tribes] asserted that some energy ROWs were originally obtained for little or no compensation, and that past compensation rates are relevant to the current study." Draft at 23. However, the Draft's analysis of historic compensation rates provides no evidence to suggest that tribes were systematically paid below fair market value for their lands. *See* Draft at Ch. 5. Hence, the Final Report should state that its analysis does not support this statement.

(6) The Draft notes that "most energy ROW negotiations are completed successfully. This is true even if the negotiations are protracted and the method for determining the value of the energy ROW results in compensation that sometimes greatly exceeds the market value of the tribal lands involved." Draft at 23. The Draft's comments suggest that any negotiation that is concluded – even if conclusion is achieved under coercive circumstances that yielded an unreasonably high payment – can be viewed as having been "completed successfully." In this case, the term "successful" has been rendered devoid of all meaning and should be eliminated in the Final Report.

4.3. Scope and Nature of the Issue

The Draft states that the issue of ROW pricing policy on tribal land, while "significant for the parties…does not appear to be consequential for the nation or for consumers in general…". Draft at 24. The Draft proceeds to offer four "reasons" to support this assertion. However, these four "pillars of support" are based on unsound reasoning and should be deleted in the Final Report, along with the conclusion of no national importance. We address each of these assertions in turn.

(1) The Draft's **first** justification for its conclusion of no national importance is that energy transportation accounts for only a small share of overall energy costs. Draft at 24. However, this justification should be eliminated because the Draft's metric for assessing the importance of this issue is deeply flawed. Congress recognizes that energy transportation infrastructure siting and construction issues are critical to the economic well-being of our nation and has issued several directives that are intended to facilitate the siting of new energy transportation infrastructure. This infrastructure is important because it enhances system reliability,[61] provides consumers with access to

[61] *See e.g.*, NCEP White Paper at p.16. The White Paper also points to a May 2002 study by the DOE, which concluded that declining transmission system investments and deteriorating infrastructure, combined with growing electricity demand, were creating regional bottlenecks in the transmission system and jeopardizing the reliability of the nation's power grid.

distant low cost energy supplies, and reduces their need to rely on more costly local supplies. As discussed in the Sempra case study, these costs have already been significant. *See* § 1.3.2 above.

Likewise, the Draft's **second** justification for its conclusion of no national importance is that the fraction of energy transportation infrastructure that is (currently) on tribal lands is also small. Draft at 24. The Draft proceeds to state that the effects are not large enough to have a significant effect on overall energy transportation costs and the total cost of delivered energy paid by consumers. *Id*. However, this argument should be deleted in the Final Report because it suffers from at least two fatal flaws.

(a). As explained in FAIR's Response to § 1.3 above, current ROW pricing policy has already been very costly to energy consumers in regions in which ROW were recently renewed. Moreover, as detailed above, when we look forward in time, these price impacts are likely to increase substantially unless current tribal ROW pricing policy is changed. With new transmission and pipeline capacity required in areas containing tribal lands, there are likely to be significant costs associated with building around these areas—that is, if the projects are not actually cancelled due to unfavorable economics. Moreover, as our illustrative calculation showed, the price impacts for existing pipelines and transmission lines alone could be over $700 million per year, and this figure is not necessarily an upper bound on annual fees associated with existing infrastructure on tribal ROWs. *See* FAIR's Response to § 1.3.2 above.

(b). The Draft's implication that the cost of ROWs must be a significant share of overall energy costs in order to be of interest to policymakers is inconsistent with the principles of good public policy, which requires that the ***overall*** costs of a new or existing rule be compared to its ***overall*** benefits, as discussed at length in Circular A4, a federal document addressed "to the heads of executive agencies and establishments" that is "designed to assist analysts in the regulatory agencies by defining good regulatory analysis…and standardizing the way benefits and costs of Federal regulatory actions are measured and reported."[62]

Many problems can be dismissed as insignificant if their costs are compared to the total size of U.S. energy bills or the total number of U.S. energy consumers. Thoughtful public policy-making considers whether the benefit associated with a particular rule or policy outweigh its aggregate costs; it does not simply divide one aspect of the policy's costs by all the consumers in the U.S. and dismiss the individual consumer impacts as trivial—and therefore tolerable.

[62] *See* http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf at p.1; attached as Exhibit F.

In fact, the Federal Government is required to apply such cost benefit analysis to all "major" rules and regulatory actions -- *i.e.*, rules and regulatory actions that are likely to have an annual impact of over 100 million dollars on the economy. According to the *2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*:

> A major rule is defined in Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996: Congressional Review of Agency Rulemaking (5USC 804(2)) as a rule that is likely to result in: (A) an annual effect on the economy of $100,000,000 or more (B) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets."[63]

The Draft's **third** justification for its conclusion of no national importance is that **"**Apart from price impacts, there is no evidence to date that any of the difficulties associated with ROW negotiations have led to any adverse impacts on the reliability or security of energy supplies for consumers." Draft at 24. This justification should be eliminated, or a more balanced analysis incorporated due to the following two fatal flaws:

1. As noted above tribes can have an important impact on infrastructure siting decisions; their activities can significantly delay or even halt proposed energy transportation projects. *See* § 1.3.2 above. When needed projects are delayed or cancelled, consumers suffer with diminished reliability and/or higher cost service, both of which can impose substantial costs on the economy. Hence, the Report must recognize that tribes are part of the energy infrastructure siting issue and discuss how to integrate current ROW pricing policy on tribal lands with Congressional directives aimed at removing siting constraints, such as EPAct2005 Sections 1221 and 368.

2. Although the Draft acknowledges that current policies have impacted energy prices, it appears to dismiss these price impacts as being of little importance. However, as discussed in previous sections, our nation will bear these costs in the form of increased energy prices and reduced reliability for underserved markets, higher transportation prices for existing facilities and the greater costs associated with projects for which it is economically viable to build around tribal lands.

[63] *See* http://www.whitehouse.gov/omb/inforeg/2005_cb/final_2005_cb_report.pdf.

The Draft's ***fourth*** justification for its conclusion of no national importance is that **"**the problem may be essentially self-limiting. That is, most tribes need additional revenue sources and have reasons to seek economic development opportunities. At the same time, many energy companies have commented that they now find negotiation with tribes so difficult that with respect to new pipelines of transmission lines, they will 'build around' tribal land if possible." Draft at 24.

This argument is flawed because even problems that are self-limiting can be extremely costly; the sound public policy principles that executive agencies and establishments are required to follow in analyzing regulations mandate a comparison of the cost of a policy with the benefits that it produces, as noted above. Industry has discussed the costs of current policy in detail. Although energy transporters facing impending renewals had strong incentives to remain silent on this issue, industry submissions brought to light numerous cases in which energy transportation providers are: (i) incurring significant costs by routing new construction around tribal land, and/or (ii) paying ROW renewal fees that are huge multiples of the actual burden that the ROW impose on the tribes. Companies have also documented examples of projects in transmission-constrained areas that were cancelled due to the activities of tribes, as well as instances in which companies uprooted existing infrastructure because they were unable to reach agreement with a tribe.[64]

As discussed in detail above, today's tribal ROW pricing policy is already increasing the costs of energy transportation in many regions of the West and future costs will be many times greater, if current trends continue. While the current and future costs of this policy have been amply documented, the Draft has provided *no* analysis of the benefits of current policy other than implying that tribal contributions in energy production would somehow be impaired if there were a change in current tribal ROW policy. Yet even here, the Draft's conclusion is logically unsound. It is in the Tribes' interest to produce energy from their lands as long as such energy production is profitable. If current tribal ROW policy is changed to provide greater certainty to energy transporters, more companies will have an incentive to locate intra- and interstate pipelines and transmission lines on tribal lands and Tribes' ability to access this vital energy transportation infrastructure will be enhanced rather than diminished. *See* § 1.3.4 above.

4.4. Options to Address the Issue

4.4.1. Options for Consideration by the Parties or the Departments

[64] *See* June 9, 2006 submission on behalf of Sempra in response to DOE/DOI additional information request. In this submission, Sempra provided an Environmental Impact Report indicating that Questar had relocated its Southern Trails Pipeline off the Morongo Reservation "…because an agreement acceptable to the Morongo Band of Mission Indians (Morongo) has not been reached."

4.4.2. Options for Consideration by Congress

The agencies were charged by Congress to make "recommendations for appropriate *standards* and *procedures* for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROWs on tribal land;" EPAct § 1813(b)(2) (emphasis added). In order to fulfill this mandate, each of the recommendations from the agencies to Congress should include both a "standard", or method for determining "fair and appropriate compensation," and a "procedure", which is to say a mechanism by which the standard will be enforced. Given this dual directive, each of the recommendations or options presented to Congress must include both key ingredients: a standard for determining fair compensation and a method by which that standard will be enforced in the absence of voluntary agreement of the parties. Any "option" which fails to include both of these requirements is no option at all for "determining fair and appropriate compensation" as required by the statute.

Given the twin requirements in the plain text of the statute, the first three options presented for Congress' consideration—(a) no change; (b) clarification of tribal consent; and (c) establishment of voluntary valuation method—all fail to provide Congress with a recommended "procedure" for resolving the present conflicts. *See* Draft at 28-30. Indeed, the first two options fail both of Congress' requirements by providing neither a "standard" nor a "procedure" for implementing the standard. Moreover, the first "option" is really an affront to Congress since it is no recommendation for "appropriate standards and procedures" at all. Likewise, the second recommendation-- codifying tribal consent for all energy ROWs-- is in no way a mechanism for determining "fair and appropriate compensation", but would instead remove any protection that "fair compensation" would ever be achieved by codifying the very root cause of the present problem: unfettered tribal discretion. Given that none of the first three "options" answer the request made by Congress to the agencies, each of them should be deleted from the Final Report.

In fact, only the final two options—(d) binding valuation; and (e) condemnation—include both a standard and a procedure for establishing that standard as requested by Congress. As such, both should remain in the Final Report as options deserving of Congress' ultimate consideration.

Option (d) has the benefit of allowing an independent third party (procedure) to determine fair compensation (standard) when the parties fail to reach an agreement. This option respects the integrity of voluntary negotiations between parties while also ensuring "good faith" on both sides by making both parties ultimately accountable to a neutral arbiter.

Likewise, option (e)'s procedure of eminent domain provides a venue for determining just compensation. Eminent domain is preferred to the present system which has no mechanism for ensuring accountability for tribes, which often possess

monopoly power over existing ROWs. As such, the option of condemnation should remain in the Final Report sent to Congress.

5. Analyses of Negotiations and Compensation Paid for Energy ROWs on Tribal Land

5.1. Background

The background section should summarize conclusions that can reasonably be drawn from the case studies presented in the Draft and supplemented hereby.[65] For example:

(1) The Draft's case studies provide no compelling evidence to support the contention that the tribes were paid less than FMV for their lands either now or in the past. In many cases, compensation paid on tribal lands for term-limited ROW exceeds the compensation paid to similarly-situated private landowners for a perpetual ROW.[66]

(2) Compensation for energy ROWs on tribal land has increased dramatically for many energy companies. For some ROWs the rate of growth has been as high as ***8% per year above inflation***, starting from initial payments based on FMV.[67] It is clear that a FMV-based standard no longer applies to tribal ROWs and that increasing numbers of tribes are exploiting their ability to charge new and existing facilities ROW fees that amount to building around tribal land.[68]

(3) Tribes have also used their leverage of withholding consent to acquire existing energy assets at bargain basement prices. Two examples can be drawn from the case studies in the Draft Report; these are discussed below in our comments on section 5.4.

(4) Currently, we have seen only the tip of the iceberg with respect to the full impact of ROW pricing policies on tribal lands. Over the next 15 years, hundreds of ROWs will come up for renewal. The case study evidence suggests that ROW fees are continuing to escalate and are headed toward build-around cost for transportation facilities. As noted in previous sections, the costs associated with new construction routing around tribal lands can be enormous. Finally, projects that are delayed or cancelled due to tribal activities will also cost consumers hundreds of millions of dollars in increased commodity costs.

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[65] *See, e.g.*, discussion of Sempra at § 1.3.2 above.

[66] *See, e.g.*, Draft § 5.4.2 (c) and 5.4.4 (d).

[67] *See* submission of INGAA, page 9.

[68] *See, e.g.*, the Southern Ute – Mid-America case study presented in § 5.4.2 (c) of the Draft.

5.2. Case Study and Survey Process

The analyses presented focus only on ROWs for transportation pipelines and transmission lines already located in or on tribal land. This backward-looking approach provides no indication of either: (1) the resources expended by energy transporters seeking to route around tribal lands, or (2) the higher commodity costs borne by consumers due to projects that are either delayed or rendered uneconomic by current tribal ROW policies.

To address these issues, the Final Report should include case studies focusing on energy transporters that have either built around tribal lands or cancelled infrastructure projects due to tribal activities, as in the case of Sempra. The Draft should also include information on the estimated build around costs for the case studies where this information is available. *See, e.g.*, the Southern Ute – Mid-America case study; *See* § 5.4 (1) (c) below.

5.3. Limitations on Historical Analysis

5.3.1. Number of Energy ROWs on Tribal Land

The Draft notes that "The exact number of energy ROWs on tribal land has not been calculated" (Draft at 32). In addition to the examples provided to illustrate the scope of energy ROWs on tribal land, it would be helpful for the Final Report to give an estimate of the total length of energy ROWs on tribal land. As noted in Table 1, *see* § 1.3.2 above a mapping company estimated for FAIR that there are currently 7,468 miles of natural gas pipelines on tribal land. This is likely an underestimate because it does not include midstream or gathering lines and may not include loop lines. The mapping company further estimated that there are currently 21,225 miles of electric transmission lines on tribal land.

5.3.2. Difficulty of Comparing Energy ROWs

Many of the case studies presented in the Draft are difficult to interpret because they suffer from one or more of the following defects:

(1) Compensation figures are presented for ROWs of various terms from 5 years to perpetual leases. No effort is made to compute standardized ROW rates to allow for comparison across ROWs of differing terms. Standardizing amounts to reflect, for example, a 20-year ROW would make it easier to compare the various agreements.

(2) ROW compensation rates are provided in a variety of units: per rod, mile, acre, etc., rather than converted to common units, as would be consistent with careful analysis. Converting all compensation rates to rods or, where necessary, acres, would also make it easier to compare across agreements.

(3) Some payments are presented on a lump-sum basis; others are annual. No attempt is made to convert annual payments to lump-sum or vice versa. Occasionally it is not clear whether a payment is annual or lump-sum.

(4) Dollar figures are given for dates as far back as 1945 and as recent as the present without any adjustment made for inflation to allow for comparison in today's dollars.

The data presented in the case studies should be standardized as discussed above so that they present a comprehensible picture of the pattern of ROW fees over time. The Draft's Navajo-El Paso case study (§ 5.4.4 (d)) portrays many of these defects. It is useful to contrast the approach taken in the Draft's case study to the Navajo-El Paso case study submitted by INGAA, in which considerable effort was taken to standardize the relevant data, along the lines discussed above.

In INGAA's case study of the Navajo-El Paso relationship, all amounts are reduced to per rod payments; payments for ROWs of different lengths are compared using a net present value calculation; annual and lump-sum payments are compared using a net present value calculation; and the CPI is used to present the results in inflation adjusted dollars. These adjustments in the data allow the reader to determine how ROW compensation has varied over time.

In contrast, the Draft's Navajo-El Paso case study includes proposed or accepted compensation amounts for a twenty year ROW, a fourteen year ROW, and one ROW of unspecified duration. The Report also presents amounts as per rod, per acre, and as lump sums. It mentions an agreement that appears to be for a lump-sum amount but includes a provision to be adjusted every five years on the basis of the CPI. None of the figures presented are adjusted for inflation. These presentation issues make it difficult for Congress to draw any conclusions about the pattern of payments over time.

5.3.3. Confidentiality of Energy ROW Information

5.4. Formal Case Studies

In addition to the previously mentioned flaws in the presentation of case studies, we note the following additional problems:

(1) Important details are frequently excluded from the case study summaries. The following are selected examples of the important details that were excluded from the report and provided only in the HRA Appendix:

> (a) In section 5.4.2 (c) discussing the El Paso natural gas mainline on the Southern Ute Indian Reservation, the Report dryly notes "The [2000] agreement called for EPNG to assign its Colorado Dry Gas Gathering System to the Tribe and for the Tribe to pay EPNG $2 million and provide renewed 20-year ROWs for the El Paso Field Service Blanco Gathering System and the mainline facilities." The Draft fails to mention (despite evidence in both

the HRA report and the INGAA submission) that the Colorado Dry Gas Gathering System for which the Southern Ute Tribe paid El Paso only $2 million, was actually worth at least $10 million, a fact that does not appear to be disputed.

(b) A similar omission is made in section 5.4.2 (d) with regard to the Red Cedar Gathering Company on the Southern Ute Indian Reservation. The report notes that in 1994, when the Public Service Company of Colorado wished to sell the company, it rejected a purchase offer from the Tribe (made in partnership with an investment firm). However, the Public Service Company of Colorado reconsidered this decision after the Tribe noted that whoever acquired the assets would still need to obtain ROW renewals from the Tribe. Unfortunately, the case study does not reveal how large a discount the Tribe was able to receive off the purchase price, due to its power to withhold consent on any future ROW negotiations to block competing purchasers and "nationalize" the gathering assets.

(c) The Report includes no discussion in section 5.4.2 (b) of the informative details contained in the HRA Appendix regarding how the Southern Ute Tribe determined compensation for the Mid-America Pipeline Company in their 1991 negotiations. The Tribe considered a fair valuation to be either 50% of the cost for Mid-America to re-route its pipeline around tribal trust land or 50% of the pro-rata share of Mid-America's annual after-tax net income based on the fraction of Mid-America pipeline crossing tribal lands.

(d) Finally, in section 5.4.4 (b) presenting the case study of the Arizona Public Service 500-kV Line crossing the Navajo Nation, the Report notes that the BIA suggested an appraisal put forward by the company was short of the "going rate." The Final Report should note that the BIA appraiser in question did not dispute that the appraisal represented the fair market value for land. Rather the appraiser was noting that other tribal ROWs cost in excess of fair market value.

(2) The case studies and surveys present no compelling evidence to support the argument that tribes were paid below FMV either now or in the past. Although FMV amounts paid may seem small in relation to current payments for energy ROW on tribal land, FMV is the standard that prevails everywhere else. Moreover, FMV reflects that actual cost burden that provision of ROW imposes on a property owner. The Draft should include in its case studies payments made to similarly situated non-tribal land owners to provide some perspective on the claim that little or no compensation was paid for these ROW in the past.[69] These data would also allow the reader to compare ROW

[69] It bears repeating that unlike ROW obtained for interstate transportation on non-tribal lands, tribal ROWs are of short-duration and term-limited. The excessive ROW fees currently being imposed on FERC-certificated interstate power and gas transmission

payments with the actual burden that ROW provision imposed on the landowner, as reflected in FMV.

infrastructure are imposed on consumers, term after term, in ever increasing multiples of FMV.

EXHIBITS
TO FAIR'S REQUESTS FOR MODIFICATIONS TO THE DRAFT REPORT TO CONGRESS

EXHIBIT A:	**Tribal Sovereignty and National Energy Transportation Policies**
EXHIBIT B:	**June 16, 2006 Fair Supplemental Report**
EXHIBIT C:	**State Standards for Valuing Rights-of-Way**
EXHIBIT D:	**Tribal Eminent Domain Statutes**
EXHIBIT E:	**Fair Market Value as the Accepted Compensation Standard for Indian Lands**
EXHIBIT F:	**OMB Circular A-4, September 17, 2003**

EXHIBIT A

Tribal Sovereignty and National Energy Transportation Policies

2. Negotiations for Energy ROWs on Tribal Land and the Implications for Tribal Self-Determination and Sovereignty: *The Draft Fails to Present an Accurate, Properly Balanced, and Fully Informative View of the Issues.*

2.1 Statutory Background: *The Draft Fails to Address Significant Issues of Statutory Intent.*

The Draft Report glosses over significant issues necessary to fully inform Congress whether it is truly "the policy of Congress and DOI . . . to require tribal consent for all energy ROWs on tribal lands."[1] The Draft Report fails to apprise Congress of numerous conclusions of Department of Interior ("Interior") officials directly contrary to such a position. It fails to analyze the strong argument that, by requiring tribal consent in the General Right-of-Way Act of 1948 ("1948 Act")[2] only for ROWs granted on lands of tribes organized under the Indian Reorganization Act ("IRA"),[3] Congress expressed an intent not to limit the authority of the Secretary of the Interior ("Secretary") to grant ROWs across lands of tribes not so organized. The Draft Report also neglects to address the specific issues raised by extending the consent requirement to renewals of ROWs and the limitation on the duration of the terms of ROWs by Interior officials. The Draft Report should be revised to address each of those matters.

Further, the Draft Report omits significant pertinent statutory background which should be considered. With certain extremely limited exceptions, ROW statutes applicable to tribal lands do not by their terms require tribal consent.[4] Notably, when Congress desired to require tribal consent as a prerequisite to issuance of ROWS, it had no difficulty doing so. For example, the 1948 Act required tribal consent only on lands

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[1] Draft Report § 3.1.1 at 16.
[2] Act of February 5, 1948, 62 Stat. 17, *codified at* 25 U.S.C. §§ 323-328.
[3] Act of Jun 18, 1934, 48 Stat. 984, *codified as amended at* 25 U.S.C. §§ 461, *et seq.* Originally, the IRA exempted from its coverage tribes located in Oklahoma and the then Alaska Territory. In 1936, the IRA was extended to permit reorganization of tribes in Alaska, *see* Act of May 1, 1936, 49 Stat. 1250, *codified at* 25 U.S.C. § 473a ("Alaska IRA"), and to permit reorganization of tribes of Oklahoma under the Oklahoma Indian Welfare Act, Act of June 26, 1936, 49 Stat. 1967, *codified at* 25 U.S.C. §§ 501-509 ("OIWA"). As used herein, the phrase "IRA tribes" refers to and includes tribes reorganized under the IRA, the OIWA, and the Alaska IRA.
[4] *See* Historical Research Associates, Inc., Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948-2006, at 4, n.3, n.4, and 5 (July 7, 2006) (citing Act of March 2, 1899, 30 Stat. 990; 25 U.S.C. § 321; Act of March 4, 1911, 36 Stat. 1253, *codified as amended at* 43 U.S.C. § 961).

of IRA tribes, plainly contemplating that tribal consent not be required for other tribes.[5] The 1948 Act did not, however, repeal, modify or otherwise amend pre-existing ROW statutes for tribal lands, which remain unaltered, including the absence of a tribal consent requirement.[6]

Despite this Congressional expression, the Draft Report unquestioningly fails to address the significant issue of legislative intent: that being, whether Congress intended to extend the tribal consent requirement under all ROW statutes to all tribes based solely upon imposition of such a requirement for only IRA tribes, with respect to 1948 Act ROWs. Congress will not be well served if the final Report ignores this statutory history and the compelling evidence of a far narrower historic interpretation of the 1948 Act. Non-IRA tribes do not possess IRA tribes' prerogatives, and Congress has never extended powers granted by the IRA to non-IRA tribes.[7] Statutory language expressly benefiting IRA tribes cannot be assumed to encompass all tribes.[8]

The plain language of the 1948 Act provides that "no grant of a right-of-way over and across any lands belonging to a tribe organized under the [IRA] shall be made without the consent of the proper tribal officials."[9] Contrary to the Draft Report's conclusion, Congress never intended for the consent provisions of the 1948 Act to apply to non-IRA tribes. The consent provision was inserted in the 1948 Act for the single purpose of preserving the "consent"[10] powers granted to IRA tribes.[11] The Secretary can neither interpret the 1948 Act to include non-IRA tribes by ignoring Congress' statutory distinction, nor may he extend the consent provision of the 1948 Act to all other ROW statutes.

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[5] *See* Draft Report § 2.1 at 12. *See also* Act of August 5, 1882, 22 Stat. 299 (tribal consent required); Act of March 2, 1889, 25 Stat. 852 (tribal consent required); Act of June 6, 1894, 28 Stat. 87 (tribal consent required).

[6] *See* 25 U.S.C. § 326 (stating that the 1948 Act "shall [not] amend or repeal . . . any existing statutory authority empowering the Secretary . . . to grant rights-of-way over Indian lands . . . .").

[7] *See* November 28, 2005 Comments of Thomas H. Shipps, Esq., made on behalf of the Southern Ute Indian Tribe on the West-Wide Energy Corridor Programmatic Environmental Impact Statement at 2 ("As a result of its organization under the Indian Reorganization Act ("25 U.S.C. 476), the [Southern Ute] Tribe has certain powers recognized and vested by Congress, including the power 'to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.'").

[8] *See Navajo Resources, Inc. v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 10 IBIA 72, 89 I.D. 412, 414 (1982) (the meaning and conditions in the Act of May 11, 1938, 52 Stat. 347, codified at 25 U.S.C. § 396a, bestowing rights on IRA tribes but not on non-IRA tribes are "absolute").

[9] 25 U.S.C. § 324.

[10] *See* 25 U.S.C. § 476(e) (IRA tribes are bestowed with the power "to prevent the sale, disposition, lease, or encumbrance of tribal lands . . . ."). Non-IRA tribes did not acquire from Congress such authority. *See* 25 U.S.C. § 478b (If voting to reject the IRA, '[a]ll laws . . . affecting any Indian reservation [are to be] deemed to [be] continuously effective as to such reservation, notwithstanding passage of [the IRA].").

[11] *See* July 22, 1947 Letter from Under Secretary Oscar L. Chapman to Arthur H. Vandenberg, President pro tempore of the Senate, attached to H.R. Rep. No. 79 and S. Rep. No. 823 at 1036 (1948) ("The proposed legislation would vest in the Secretary . . . authority to grant rights-of-way of any nature over the Indian lands described in the bill. The bill preserves the powers of those Indian tribes organized under the [IRA, Alaska IRA, and OIWA] with reference to the disposition of tribal lands.").

The Draft Report fails to recognize that, where a statute, such as the 1948 Act, specifically "names the parties who come within its provisions, other unnamed parties are excluded."[12] Non-IRA tribes are outside of the 1948 Act's consent mandate and the consent requirements of the 1948 Act do not extend to every other ROW statute affecting tribal lands.[13] Accordingly, if not revised, the Draft Report would do Congress a disservice by concluding, without even identifying the issue and the countervailing arguments, that "the statutes empower the Secretary to require tribal consent for a tribe organized under the [IRA], and they vest the Secretary with the discretion to mandate tribal consent [in all other instances and under all other ROW statutes] . . . ."[14] As to at least one of those ROW statutes, a former Solicitor of Interior would seriously disagree with the Draft's present conclusion. With respect to the Act of March 11, 1904, Acting Solicitor Flanery opined:

> Such [tribal] consent is not necessary unless required by the act of Congress authorizing the grant of a right-of-way, and traditionally tribal consent had not been required by Congress in authorizing the grant by the Secretary . . . of various rights-of-way (see 25 U.S.C., 1946 ed. Secs. 321-322).

Memorandum of Acting Solicitor W.H. Flanery to the Secretary, *Right-of-way for transmission line across Crow tribal lands to Yellowtail dam site* (September 10, 1952) (the "*Flanery Memorandum*").

Moreover, the Draft Report's discussion of the impact of the 1948 Act on non-IRA tribes and statutes other than the 1948 Act conflicts with Interior's past representations to Congress; those representations being made at a time when recollections of Congress' 1948 intent were far clearer. In a January 27, 1968 letter to the Honorable Robert E. Jones, Chairman, Natural Resources and Power Subcommittee, then Secretary Stewart Udall advised Congress that:

> it has always been understood, not only by officers of the Department but by many who have represented parties desiring rights-of-way over tribal lands, that the Secretary has the authority, regardless of the regulations, to grant the same on his own initiative in the case of tribes not organized under the [IRA].

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[12] *Foxgord v. Hischemoeller*, 820 F.2d 1030, 1035 (9th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987). *See also Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) ("The doctrine of *expressio unius est exclusio alturius* 'as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operations, all omissions should be understood as exclusions.'") (citations omitted), *cert. denied*, 126 S. Ct. 367 (2005).

[13] *See* 25 U.S.C. § 326.

[14] Draft Report § 2.1 at 13.

H.R. Rep. No. 91-78, at 40-41 (1969).

The Draft Report should be revised at Sections 2.1, 3.1.1 and 3.1.2 to reflect that there is a substantial question as to both whether Congress extended the consent requirement for IRA tribes in the 1948 Act to all tribes under all authorizing statutes—and whether Interior has overstepped its authority in so extending the requirement. Federal agencies "must give effect to Congress' intent in passing [the 1948 Act]. Here . . . although [agencies] wish [Congress] had spoken differently . . . [they] cannot remake history."[15] The 1948 Act and the other statutes referenced in this section of the Draft Report do not support the conclusion that tribal consent is mandatory under the 1948 Act for non-IRA tribes and mandatory for all tribes under all other ROW statutes.

2.2 Regulatory Background: *The Draft Fails to Address the Propriety of Interior's Regulations and Policies Regarding Consent, Renewal, and Term.*

25 C.F.R. § 169.3, which requires written consent of the tribe prior to the Secretary's issuance of a right-of-way over and across tribal land, has appeared in its present form since 1971.[16] That being said, requiring tribal consent for non-IRA tribes and for all ROW statutes far exceeds and is not "in line" with the tribal consent provisions of the 1948 Act.[17] The Secretary can only give meaning to Congress' express reference to IRA tribes in the 1948 Act and is without jurisdiction or authority to expand the contents of the 1948 Act to other ROW statutes or to remove the IRA/non-IRA distinction by regulation.

Contemporaneouly with enactment of the 1948 Act, Interior recognized Congress intended that consent is only required for IRA tribes. In 1952, following the initial promulgation of the regulation, the Bureau of Reclamation sought Interior's approval of a grant of right-of-way for an electric transmission line crossing lands of the non-IRA Crow Tribe in the absence of that tribe's consent. The Acting Solicitor of Interior advised the Secretary that:

> there is ample authority under the [1948 Act] . . . , to grant the right-of-way, notwithstanding the lack of Indian consent. . . . . *The 1948 act requires the consent of the tribe only if it has*

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[15] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998).

[16] *See* 36 Fed. Reg. 8520, Proposed Rule Making (May 7, 1971) and 36 Fed. Reg. 14183, Final Rule (July 31, 1971), revising 25 C.F.R. § 161.3 to require the "prior written consent of the tribe." Prior to that revision and subsequent to 1951, the regulation required the "prior written consent of the tribal council . . ."

[17] January 27, 1968 Letter from Secretary Stewart L. Udall to Robert E. Jones, Chairman, Natural Resources and Power Subcommittee of the Committee on Government Operations, House of Representatives, attached to H.R. Rep. No. 91-78 at 40-41 (1969) ("Udall Letter").

> *organized under the [IRA] . . . in view of the wide powers of Congress over the management of Indian tribal property, the necessity of securing tribal consent cannot be read into the statute by implication.*

Flanery Memorandum at 1-2 (emphasis added).

25 C.F.R. § 169.3 goes beyond the 1948 Act's strict consent limitations to IRA tribes and seeks to extend the requirement to all ROW statutes for all tribes, without authorization from Congress. The regulation contravenes contemporaneous policies and holdings of Interior.[18] The Draft Report should be revised to inform Congress of this conflict; it should not sweep the issue "under the rug."[19]

The Draft Report also fails to address Interior's extension of the consent requirement from the point of initial grant of the ROW to any renewal of the same ROW. 25 CFR § 169.19 provides that a renewal of a ROW may only be granted "with the consent required by § 169.3 . . . ." However, any sovereignty implications of a grant of ROW are significantly reduced at the point of renewal, and the consent requirement gives overwhelming bargaining power to tribes at the renewal stage. The Draft Report should separately address this issue and Congress' options in leveling the playing field at the point of renewal.

Finally, the Draft Report neglects to address the contentious issue of ROW tenure. While the Draft recognizes parties consume precious time and resources in repeated negotiations, it fails to address the ambiguity and inconsistency in Interior's policies regarding the terms of ROWs. The 1948 Act regulations expressly state that ROWs for both electric transmission lines and oil and gas pipelines may be "without limitation as to term of years."[20] However, Interior offices often take the position that ROWs may only be granted for a 20-year term, or less. The Draft Report should be revised to address the impact of ROWs of shorter duration and Congress' options concerning the tenure of energy ROWs.

2.3 Federal Policy of Tribal Self-Determination: *The Draft Fails to Present a Balanced Discussion.*

The Draft Report would have the reader believe that the policies underlying the IRA and the Indian Self-Determination and Education Assistance Act[21] should drive all

[18] *See e.g., Flanery Memorandum* and Udall Letter.
[19] The Draft Report incorrectly cites support for the statement that the tribal consent regulation was "designed to implement and harmonize the 1948 Act with the myriad of other ROW statutes . . . ." Draft Report § 2.2 at 13. In point of fact, 16 Fed. Reg. 8578 (1951), referenced at footnote 61, contains no such assertion.
[20] *See* 25 CFR § 169.19
[21] Act of January 4, 1976, 88 Stat. 2203, codified at 25 U.S.C. §§ 450, *et seq.*

decisions respecting ROWs and ROW statutes applicable to tribal lands. The Draft Report should properly present both sides of the issue to Congress.

The Draft Report does not recognize that tribes no longer possess the full attributes of sovereignty.[22] To the contrary, tribal sovereignty is dependent upon, and subordinate to, the Federal Government.[23] Congress has the power not only to enact the IRA and other statutes expressing a "policy" of respect for tribal culture, rights, and traditions, but to substantively alter or restrict any retained sovereignty the tribes may possess.[24] Congress is not bridled by any one "policy," and must balance tribal self-determination policies with other national interests and policies, including national energy policies. Congress may diminish tribal lands and powers by statute, and such statutes must be interpreted to implement their clear intent.[25] By failing to address Congress' options to balance self-determination policy with compelling policies to facilitate the transport of critical energy resources, the Draft Report does not articulate the basis upon which Congress may undertake the options delineated at Section 4.4 of the Report. The Draft Report should be revised to inform Congress of what it is empowered to do.

The Draft Report omits any reference to Interior's differing interpretations when describing 25 C.F.R. § 169.3 as "a longstanding interpretation of the pertinent statutes by the agency charged with their administration."[26] Just because 25 C.F.R. § 169.3 has been on the books for a number of years does not, however, make it the law on the subject.

It is clear that "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."[27] The "starting point" to determine the meaning of the 1948 Act is not 25 C.F.R. § 169.3. Rather, it is "the language of the [1948 Act] itself."[28] Interior's interpretation of the 1948 Act and extension of tribal consent to all ROW statutes, "even if well established [by passage of time], cannot be sustained if, as in this case, it conflicts with the clear language and legislative history of the [1948 Act]."[29]

All federal statutes that impose regulation on tribes conflict to some degree with self-determination policies. Presumably, Congress sought an unbiased and accurate Report from Interior and Energy when it directed preparation of the Section 1813 study. By presenting an uncritical rationalization of the status quo, the Draft Report fails in this

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[22] *See Santa Clara Pueblo v. Martinez*, 536 U.S. 49, 55-6 (1978).
[23] *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).
[24] *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979).
[25] *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 357.
[26] Draft Report § 2.2 at 13. *See also* FAIR's comment on § 2.1 of the Draft Report, above.
[27] *Public Employees Ret. System of Ohio v. Betts*, 492 U.S. 158, 171 (1989).
[28] *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979).
[29] *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 779, n.22 (1984).

regard. The Draft Report should be revised to assist Congress in: (i) balancing self-determination policies with the need for fluid transport of energy by identifying the exact self-determination factors involved; and (ii) setting forth how those conflicting policies may be mitigated and addressed.

2.4 The Issue of Consent and Implications for Tribal Sovereignty: *The Draft Does Not Apprise Congress of Its Authority in this Area.*

According to the Draft Report, "[t]he principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of consent. A tribe's authority to confer or deny consent to an energy ROW across tribal land derives from its inherent sovereignty . . . ."[30] However, a tribe's ability to control energy ROWs is not so easily traced to an amorphous concept of "tribal sovereignty." Such control is more a product of statute, not an administrative regulation, that is or is not recognized at the will of Congress.

It is only "[i]n the absence of treaty provisions or congressional pronouncements to the contrary, [that a] tribe has the inherent power to exclude non-members from [its] lands."[31] In the realm of energy ROWs, that inherent power has been removed except for IRA tribes under the 1948 Act and in specific statutes granting statutory ROWs.[32]

Congress and the Secretary exercise ultimate control and exclusionary powers over tribal land; not Indian tribes. Tribes are not permitted to grant ROWs or other interests in their lands unless ratified by the Secretary or authorized to do so by Congress.[33] In turn, Congress has chosen to delegate to the Secretary the power to issue ROWs on tribal lands, and not to the tribes themselves. The Secretary grants ROWs to non-Indians under directives of Congress.[34] When Congress enacts a ROW statute that does not require tribal consent, as it has done in all general ROW statutes except for the IRA provision of the 1948 Act, tribes are without the power to exclude the ROW holder because Congress has determined tribal consent to be non-controlling.[35] The Report will

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[30] Draft Report § 2.4 at 14.
[31] *Quechan Tribe v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).
[32] Illustrating both (i) that Congress is fully aware how to require tribal consent when it desires to do so, and (ii) that tribes are not the controlling entity with regard to issuance of ROWs, Congress generally withheld a tribal consent prerequisite from specific ROW statutes; on occasion permitting the tribal owner to have a say in whether the ROW was to be granted or as to the amount of compensation to be received. *See, e.g.*, 25 Stat. 852; 22 Stat. 299; 28 Stat. 87. In all other situations, the statutes accord tribes no say whatsoever, whether by "inherent sovereignty" or otherwise, as to if a ROW is to be issued or as to the adequacy of the compensation fixed for usage of a tribe's land.
[33] *See* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").
[34] *See, e.g.*, 25 U.S.C. § 323 ("[t]he Secretary . . . is hereby empowered to grant rights-of-way . . . ."); 25 U.S.C. § 321 ("[t]he Secretary . . . is authorized and empowered to grant a right of way . . . .").
[35] *See Quechan Tribe v. Rowe*, 531 F.2d at 411.

better inform Congress if it is revised to accurately reflect this law and history rather than one-sidedly touting tribal sovereignty.

In addition, in those situations where tribes do not exercise a monopoly on an economic subject, such as energy ROWs, tribes more readily adapt their demands to market conditions. Thus, sovereignty may not be the sacrosanct and unyielding concept the Draft Report suggests. In this regard, tribes on many occasions: (i) waive sovereign immunity, defer or relinquish taxing authority, and grant land use privileges as part and parcel of mineral development agreements entered into pursuant to the Indian Mineral Development Act ("IMDA");[36] and (ii) enter into gaming compacts that require sovereign immunity waivers, application of state law, income sharing, and other dilutions of sovereign powers.[37] The Draft Report should explain how tribes' concerns with permitting energy ROWs can be accommodated in a similar fashion. It does not advance Congress' grasp of the issue to suggest, as the Draft Report does in the quotation below, that any balancing or accommodation of sovereignty violates some talismanic standard:

> The implication of any reduction in the tribe's authority to make [a ROW] determination is that it would reduce the tribe's authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination.

Draft Report, § 2.4 at 14. Inexplicably, the Draft Report does not adequately address that sovereignty and self-determination labels are advanced to support tribes' ability to collect sums for energy ROWs that are not available in an open and free market. As IMDA agreements and gaming compacts demonstrate, those same issues of are of much less importance when a tribal sovereign must compete with others for business and development opportunities. The Draft Report should be revised to recognize that tribal sovereignty is neither monolithic nor inflexible: in non-restricted markets, tribes, like all sovereigns, trade elements of their sovereignty for business and development opportunities as part of routine operating procedures. That recognition makes the argument for an overarching need of tribes to control energy ROWs substantially less than compelling.

Section 2.4 of the Draft Report additionally fails to discuss the critical element treaties play in understanding "the statutory and regulatory requirement of consent."[38] The Draft Report notes that "the relationships between federal and state governments and

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[36] Act of December 22, 1982, 96 Stat. 1938, codified at 25 U.S.C. §§ 2101-2108. Waivers of sovereign immunity in IMDA agreements take place under the requirements of 25 C.F.R. § 225.21(b)(13), which requires that such agreements contain "[p]rovisions for resolving disputes."

[37] *See Tribal –State Gaming Compact between the Fort Mojave Indian Tribe and the State of California*, available at http://www.cgcc.ca.gov/compacts.html; *Indian Tribe –State of Arizona Gaming Compact*, available at http://www.gm.state.az.us/compacts.htm.

[38] Draft Report § 2.4 at 14.

tribal governments are complicated and [are at times] delineated in . . . treaties . . . ." The Draft does not, though, inform Congress of treaty provisions which must guide the recommendations sought by EPACT § 1813(b)(3) relating to tribal self-determination and sovereignty.[39]

Pursuant to Article VI of the United States Constitution, a treaty between an Indian tribe and the United States is "the supreme law of the land . . . ."[40] The "courts can no more go behind [an Indian treaty] for the purpose of annulling its effect and operation than they can go behind an act of Congress."[41] Neither can the President[42] nor an administrative agency "under any circumstances abrogate an Indian treaty directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so."[43]

As was clearly pronounced by tribal representatives in their written comments and at the August 24 and 25, 2006 public meetings, tribes regard their treaties as vibrant documents containing detailed mechanisms for the siting of federally-ordered works of utility, such as interstate electrical transmission lines and natural gas transportation pipelines, on their reservations.[44] Some tribes which have reorganized under the IRA assert powers to exclude non-Indians by virtue of that statute which are greater than those

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[39] Congress ordered that the Departments to provide it with "(3) a report on the findings of the study, including – . . . an assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy rights-of-way on tribal land." EPACT § 1813(b).

[40] *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 (1968) (internal quotation omitted).

[41] *United States v. Minnesota*, 270 U.S. 181, 201 (1926).

[42] *Mille Lacs Band of Chippewa Indians v. Minn.*, 861 F. Supp. 784, 823-24 (D. Minn. 1994) ("The Constitution does not provide the President with the power . . . to abrogate rights guaranteed under treaties. Congress has plenary authority over Indian affairs. *Lac Courte Oreilles Band,* 700 F.2d [341] at 361 [(7th Cir. 1983)]; *see also Warren Trading Post v. Arizona Tax Comm'n,* 380 U.S. 685 [ ] (1965). This authority is based on the treaty power and the Indian commerce clause. U.S. Const. art. II, § 2, cl. 2; and art. I, § 8, cl. 3. Only Congress can abrogate an Indian treaty right by expressing that intention clearly and plainly. *See, e.g., United States v. Dion*, 476 U.S. 734, [ ] (1986); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 567, 47 L. Ed. 299, 23 S. Ct. 216 (1903).").

[43] *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203 (10th Cir. 2002) (quoting *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981); and citing *United States v. Dion*, 476 U.S. 734, 738-40 (1986); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653,670-71 (1979)).

[44] *See* May 15, 2006 Comments of the Rosebud Sioux Tribe, § B.1 at 4 ("Article XI, Section 6 of the Fort Laramie Treaty of 1868 governs, among other things, the construction of utility works through our Reservation."); August 24, 2005 Oral Comments of Randall Meese (same). *See also* August 25, 2006 Oral Comments of Carl E. Venne, Chairman of the Crow Nation and Don Lavender, Esq., Legal Counsel to the Crow Nation.

of non-IRA tribes.[45] With regard to treaty provisions, the Supreme Court has affirmed that federally-ordered works of utility and the tribes' agreement and consent thereto in particular treaties permit utilities to cross their reservations.[46] Congress should be informed that certain treaties unquestionably permit the construction of utilities across tribal lands without additional tribal consent.

As mandated by § 1813(b)(3), Interior and Energy should inform Congress of the distinction between those tribes which are parties to continuing agreements for construction of works of utility and necessity in their treaties, and those tribes which may possess greater exclusionary powers. Treaty provisions authorizing construction of and containing certain tribes' consent to works of utility, certainly bear upon whether a particular tribe's self-determination and sovereignty have any application whatsoever to decisions pertaining to the granting, expansion or renewal of energy ROWs on those tribes' lands.

3. National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy ROWs on Tribal Lands: *The Draft Fails to Present a Balanced Analysis of Pertinent Policies.*

The Draft Report avoids a balanced view of national energy policies implicated by ROW standards for tribal lands. For example, it is suggested that "the policies put into place by Congress and the executive branch strongly support tribal decision-making regarding energy ROWs . . . ."[47] As illustrated by the preceding discussion, the 1948 Act does not support this assertion. Interior has recognized for many years, both prior and subsequent to promulgation of 25 C.F.R. § 169.3, that tribal decision-making in energy ROWs is only appropriate when called for by Congress, and Congress has made a conscious decision when and if to place tribes in a decision-making role.

The Draft Report omits any mention of the legitimate contractual rights and expectations of the holders of energy ROWs on tribal lands, and further fails to consider whether and to what extent the supposed "policies" impact those rights and expectations. In this vein, the Draft Report fails to inform Congress that nothing in the 1948 Act or

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[45] May 12, 2006 Comments of the Jicarilla Apache Nation, § 3 at 7 ("Congress enacted the tribal consent requirement of the 1948 right-of-way act precisely to correct this possible gap in the IRA [that the powers it conveyed to reorganized tribes to prevent disposition of their lands without their consent might not apply to rights-of-way], and to preserve the powers of the tribe to control all dispositions of tribal land."). *See also*, November 28, 2005 Comments of Thomas H. Shipps, Esq., made on behalf of the Southern Ute Indian Tribe on the West-Wide Energy Corridor Programmatic Environmental Impact Statement at 2 ("As a result of its organization under the Indian Reorganization Act ("25 U.S.C. 476), the [Southern Ute] Tribe has certain powers recognized and vested by Congress, including the power 'to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.'").

[46] *See, e.g., United States v. Andrews*, 179 U.S. 96, 99 (1900) ("[The Chisolm] trail . . . would certainly be a work of utility or necessity within the meaning . . . of the treaty.").

[47] Draft Report § 3 at 15.

policy permits the "Secretary to disregard or sweep aside legitimate existing contractual" or business expectations of a ROW holder.[48] Moreover, the Draft Report shies away from informing Congress that unless action is taken, impasses are likely to arise where tribes and the Secretary, who must weigh not only tribal interests but also those of the United States' citizenry and the national interest in creating and preserving an affordable and constant supply of energy, disagree as to the granting of an energy ROW.[49] The Report should not go forward without addressing these matters in some detail.

3.1. National Energy Transportation Policies Directly Relevant to Energy ROWs on Tribal Land: *The Draft Mischaracterizes Pertinent Policies.*

3.1.1 Indian Right-of-Way Act of 1948 and Implementing Regulations

In its pervasive failure to apprise Congress concerning Interior's expanding the consent provision of the 1948 Act to encompass *all* tribes under *all* ROW statutes, the Draft Report rests too much emphasis on its citation to a 1969 House Report in declaring that Interior's "determination [as to the reach and effect of the 1948 Act] was later approvingly cited by Congress when it explained that the legislative history of the 1948 Act 'shows no congressional intent that consent ought not to be sought from 'organized tribes.'"[50] A closer reading of the H.R. Rep. No 91-78 (1969) is in order.

First, even assuming the 1969 House Report "approvingly cited" adoption of Interior's 1948 Act interpretation, which it does not, "the authoritative statement is the statutory text [of the 1948 Act], not the legislative history or any other extrinsic material."[51] The thoughts of a House Committee on a possible amendment to the 1948 Act which was never even introduced in Congress are meaningless, and cannot be used either to override the plain language of the 1948 Act or to validate Interior's regulations expanding the Act's coverage and impact on energy ROWs.[52] The Draft's attempt to

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[48] *Woods Petroleum Corp. v. United States Dep't of the Interior*, 18 F.3d 854, 858 (10th Cir. 1994), *op. adhered to on reh'g*, 47 F.3d 1032 (10th Cir. 1995) (The Secretary has a duty to weigh "the contractual rights of [energy companies] which commit millions of dollars in [costs] in reliance on provisions in [ROW grants] executed" with Interior's knowledge.).

[49] *See Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir. 1983) (holding that tribe lacked authority to terminate commercial lease without obtaining Secretarial approval thereby avoiding an "impasse between the Secretary and a unilaterally terminating tribe" which might "insist upon new terms in any new lease which the Secretary might not be inclined to approve.").

[50] Draft Report, § 3.1.1 at 16.

[51] *Exxon Mobil Corp. v. Allapattah Servs, Inc.*, 125 S. Ct. 2611, 2626 (2005) ("[R]eliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresented committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.). Such, as is explained *infra*, is the case with the Report.

[52] *See Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1071 (6th Cir. 1997) (noting that "statements made by persons in favor of a rejected or failed bill are meaningless and cannot be used as an extrinsic aid"), *cert. denied*, 520 U.S. 320 (1997), *overruled in part on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997).

characterize the 1969 House Report as an approval of Interior's actions is questionable at best.

Second and most importantly, the 1969 House Report simply does not say what the Draft Report suggests. The House Committee on Government Operations recommended that the 1948 Act be amended to: (i) address any and all tribes, and thereby remove the plain distinction between IRA and non-IRA tribes; and (ii) make tribal consent a requirement under all tribal land ROW statutes.[53] This recommendation was never adopted by Congress. In H.R. Rep. No. 91-78, the Committee recommended that consideration be given to changing the 1948 Act "to read as follows (add italicized words and delete words struck through):"

> Sec.2. No grant of a right-of-way over and across any lands belonging to ~~a~~ *any* tribe ~~organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967);~~ shall be made *pursuant to this or any other act of Congress* without the consent of the proper tribal officials or, *if the Secretary of the Interior certifies that the tribe has no tribal officials, the approval of a majority of the adult members of such tribe.*

Id. at 19 (internal footnote omitted). Congress rejected the proposal and declined to amend the 1948 Act to extend its consent requirement coverage to non-IRA tribes and to other ROW statutes.

The fact that Congress considered but did not amend the 1948 Act as proposed by the 1969 House Report, and the fact that Congress has not done so in the intervening 37 years, strongly indicates that Congress is satisfied with the law as written.[54] Congress has never "approvingly cited" Interior's construction and supposed understanding of the tribal consent requirement.[55] Even the authors of the 1969 House Report recognized then, as the final Report should now, that the "general Indian right-of-way statute [the 1948 Act] . . . explicitly requires consent only of 'organized' tribes before the Secretary may grant a right-of-way across their lands."[56] The Draft Report should be revised to

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[53] *See* H.R. Rep. No. 91-78 at 19.

[54] *See Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. at 772 ("Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses [, or the actions it does or does not take], . . . absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.") (citation and internal quotation omitted).

[55] This is especially true in light of Congress' understanding of Interior's view of the 1948 Act. *See* H.R. Rep. No. 91-78 at 40-41 (noting that "it has always been understood . . . by officers of the Department . . . that the Secretary has the authority, regardless of the regulations, to grant [ROWs] on his own initiative in the case of tribes not organized under the [IRA].").

[56] H.R. Rep. No. 91-78, at 26.

delete the mischaracterization of the House Report and to acknowledge that the proposal to amend the 1948 Act to require the consent of all tribes in all energy ROW situations did not go forward.

3.1.2 Historical Energy ROW Statutes and Regulations: *The Draft Overlooks Pertinent History and Policy.*

Relying entirely on one opinion of the Solicitor of Interior[57] and a quotation from the 1941 edition of Felix Cohen's *Handbook of Federal Indian Law*, the Draft Report asserts that the customary practice of Interior, irrespective of whether a ROW statute requires consent, has been to acquire tribal consent prior to issuance of a ROW by the Secretary. Nothing could be further from the truth.

As previously discussed, the Draft Report ignores the *Flanery Memorandum* and the Udall Letter; both of which establish that Interior has long understood tribal consent to be required *only* under the 1948 Act and then "*only* in the case of tribes organized under the [IRA] or the [OIWA]."[58] These are not, however, the only examples of Interior's true position on requiring tribal consent for energy ROWs.

In 1934, Solicitor Nathan R. Margold opined that because land was held in trust for a member of the Osage Tribe, it was "located within an Indian reservation to which the [IRA does not apply] and nothing contained in that Act [, therefore,] prevents the Secretary . . . from giving approval of the right of way grant . . . ."[59] Then, in 1936 Solicitor Margold again explained that non-IRA tribes may not veto Interior's issuance of a right-of-way because Section 16 of the IRA, 25 U.S.C. § 476, is "without application" to such non-IRA tribes.[60]

Thus, in 1934, 1936, 1952, and 1968, Interior took the official position that consent to the issuance of ROWs under the 1948 Act was not required from non-IRA tribes and their consent was not required outside of the 1948 Act, absent a specific statute requiring otherwise. The Draft Report should be revised to reflect that Interior repeatedly reached conclusions supporting that the consent requirement does not extend to non-IRA tribes or over-ride other statutes that authorize ROWs to be issued without tribal consent.

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[57] A reading of Acting Solicitor Frederic L. Kirgis' Memorandum, *Application to Flathead Tribal Lands of the Act of Aug. 30, 1890 (26 Stat. 391)*, (April 12, 1940), reveals that the Memorandum does not stand for the proposition for which it is cited in the Draft Report. The Memorandum does no more than opine that ROWs may be granted if a tribe has consented, in that case by way of a treaty provision, or in the absence of express consent, upon the payment of compensation. The Memorandum does not support the claim that Interior has historically required both tribal "consent" and tribally-approved "compensation" in the face of a ROW statute's silence regarding tribal consent.

[58] H.R. Rep. No. 91-78, at 40-41 (emphasis added).

[59] Memorandum of Solicitor Nathan R. Margold to the Commissioner of Indian Affairs, *Osage-Grant of Right-of-Way Through Trust Lands* (October 3, 1934).

[60] Memorandum of Solicitor Nathan R. Margold to the Commissioner of Indian Affairs, *Isleta and Domingo Pueblos –Rights-of-Way* (September 2, 1936).

Any indication in the Draft that the acquisition of tribal consent has been the "customary practice" of Interior, either prior or subsequent to passage of the 1948 Act, is simply incorrect.

3.2. General Policies Relating to Energy Matters on Tribal Land: *The Draft Completely Omits Discussion of Pertinent Policies.*

In reciting existing statements of general energy transportation policy relating to tribal lands, the Draft Report finds a "continuing pattern of working cooperatively with tribal governments and with tribal consent."[61] However, perhaps reflecting a failure on the part of Energy to fully engage in the study effort, the drafters have overlooked at least three expressions of national energy transportation policy stated in the 2005 EPACT that are at odds with the quoted statement.

First, Title V of the 2005 EPACT established the Office of Indian Energy Policy and Programs within Energy for the express purposes of promoting tribal energy development, efficiency and use; reducing and stabilizing energy costs; enhancing Indian tribal energy and economic infrastructure; and bringing greater electrical power and service to Indians.[62] Title V also amended the Indian Energy Act ("IEA"), directing the Secretary to "establish and implement an Indian energy resource development program to assist consenting Indian tribes and tribal energy resource development organizations in achieving the purposes of this title."[63] One of the stated purposes of the IEA amendment is to assist tribes in "carrying out projects to promote the integration of energy resources, and to process, use or develop those energy resources on Indian land[.]"[64] Congress defined the phrase "integration of energy resources" as "any project or activity that promotes the location and operation of a facility (including any pipeline, gathering system, transportation system or facility, or electric transmission or distribution facility) on or near Indian land to process, refine, generate electricity from, or otherwise develop energy resources on, Indian land."[65]

It is antithetical to believe that in one breath Congress would promote the reduction and stabilization of energy costs and in another continue a system that allows tribes to extort exorbitant ROW fees that increase those very same costs to off-reservation and on-reservation users alike. Equally disjointed is the notion that while encouraging integration of energy resources on tribal lands, Con gress should enable tribes to price themselves out of contention for those facilities and thereby defeat Congress' purpose. Provision of power and services to tribes will not and cannot

[61] Draft Report § 3.2 at 17.
[62] *Codified at* 42 U.S.C. § 7144e.
[63] 25 U.S.C. § 3502(a)(1).
[64] 25 U.S.C. § 3502(a)(2)(B).
[65] 25 U.S.C. § 3501(5).

improve if utilities locate elsewhere. The Draft Report should be revised to take notice of the national energy policy stated in Title V of the 2005 EPACT.

Second, the Draft Report omits any reference to another of Congress' stated national energy policies; namely, the designation of national energy corridors pursuant to Section 368 of EPACT.[66] Although by the express language of Section 368, the designations apply only to "Federal land in the eleven contiguous Western States[,]"[67] as was aptly testified to by the representative of the Northern Ute Indian Tribe, "as you take a look at the west, you can't say 'west' without saying 'Indian reservation,' and so there are literally, I believe, almost 30 million acres in the Rocky Mountains owned by tribal[,] allottees and organizations."[68]

To state the obvious, the energy corridors that Congress ordered be designated, and the pipelines and transmission lines they will contain, must, by necessity, be continuous "lines." Equally obvious from the proposed corridor maps[69] is that the corridors will be required to cross tribal lands. If tribes are permitted to withhold their consent to the construction of corridor segments crossing their lands, they will confound the intent of Congress, and can unilaterally defy its direction to the Secretaries of Agriculture, Commerce, Defense, Energy and Interior to "expedite applications to construct or modify oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities within such corridors . . . ."[70] In the event tribes can withhold their consent or name any price, they will trump the Secretaries' individual and collective duties to consider the need for new and upgraded electricity transmission and distribution facilities to "(1) improve reliability; (2) relieve congestion; and (3) enhance the capability of the national grid to deliver electricity."[71]

The third overlooked policy, which like the first two Congress made contemporaneously with its mandate that the Section 1813 Study be conducted and a final Report be prepared, appears at Section 1221 of the 2005 EPACT. Section 1221 amends the Federal Power Act,[72] directing Energy to designate National Interest Electric Transmission Corridors in any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers.[73] Among other factors Energy is to consider when making the designation, is whether the economic

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[66] *Codified at* 42 U.S.C. § 15926
[67] 42 U.S.C. § 15926(a)(1).
[68] October 26, 2005 Testimony Transcript of John Jurrius at the Public Meeting for the Bureau of Land Management's West-Wide Energy Corridor Programmatic Environmental Impact Statement at 29, available at: http://corridoreis.anl.gov/news/index.cfm#scopingcomments.
[69] Individual state corridor maps are available at: http://corridoreis.anl.gov/news/index.cfm#statepdmap.
[70] 42 U.S.C. § 15926(c)(2).
[71] 42 U.S.C. § 15926(d).
[72] *See* 16 U.S.C. § 824, *et seq.*
[73] *Codified at* 16 U.S.C. § 824p. *See also* U.S. Department of Energy National Electric Transmission Congestion Study, August 2006 at 45-6 (describing San Diego's "acute" transmission problems due to limited points of electric import deliveries).

vitality and development of the corridor or end markets served by the corridor may be constrained by lack of adequate or reasonably priced electricity, and whether the designation would be in the interest of national energy policy.[74]

If an applicant for an Electric Transmission Corridor cannot obtain agreement for land to construct or modify a transmission facility, the amendment provides for the power of eminent domain, and the payment of just compensation in an amount equal to the fair market value (including applicable severance damages) of the property taken on the date of the exercise of eminent domain authority.[75] It is plain that this national energy policy cannot proceed if a tribe is empowered to withhold its consent to a ROW even when it is clear that a tribe's withholding of consent will adversely affect consumers.

The 2005 EPACT's national policy of enhancing energy infrastructure, expanding service, increasing reliability, and reducing costs to all consumers, expressly including Indians and tribes, is directly at odds and likely cannot co-exist with the notion of an unconditional right of tribal consent.[76] The final Report to Congress should not only include discussion of Title V, Section 368 and Section 1221 but also inform Congress that requiring tribal consent to the issuance of ROWs can frustrate Congress' will and negate those provisions. In light of this imminent conflict, the final Report should specifically identify the policies administered by Energy that are implicated by ROWs on tribal lands.

[74] *See* 16 U.S.C. § 824p(a)(4).
[75] *See* 16 U.S.C. § 824p(e) & (f).
[76] It is a long settled rule that the Court "must, if possible, construe a statute to give every word some operative effect." *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 167 (2004).

EXHIBIT B

June 16, 2006
FAIR Supplemental Report
Economic Analysis of the Impact of Tribal Rights-of-Way Fees

June 16, 2006

FAIR Supplemental Report

Economic Analysis of the Impact of Tribal Rights-of-Way Fees

I. Introduction

This supplemental report provides an economic analysis of the impact of tribal rights-of-way (ROW) fees on consumers as requested by Dr. Abe Haspel, Assistant Deputy Secretary, Department of the Interior. Our findings can be summarized as follows:

- Submissions prepared by the tribes and their experts tend to focus on only one aspect of the current policy's impact: the amount by which ratepayers' bills will increase due to escalating ROW renewal fees for existing pipelines and transmission lines.
- The rate impacts of these escalating ROW renewal fees for existing facilities are not trivial, as indicated in Sections IIIA and IIIB. Energy transporters subject to cost of service (COS) regulation have the opportunity to recover 100% of the tribal ROW fees through rate increases.
- Most importantly, however, the submissions prepared by the tribes and their experts fail to capture the full cost impact of current ROW policy on tribal trust land. In particular, current policy creates incentives for companies to build around tribal trust lands using routes that are longer (raising construction costs) and/or more disruptive to the environment. In addition, current policy can delay and deter investments in transportation infrastructure, and may even induce companies to uproot infrastructure that is already in or on tribal lands. These impacts—both current and prospective—can lead to higher costs and fewer energy supply options for consumers.
- Moreover, these impacts are not theoretical in nature; real world examples exist and are presented herein. It is also likely that more examples would be available if companies did not choose to remain silent due to impending ROW negotiations with tribes.
- The negative impacts of current ROW policy on tribal trust lands should not be tolerated simply because they may appear to be diffuse when spread across millions of American households. Changing current ROW pricing policy on tribal trust lands to one that is based on fair market value standards would reinforce provisions of the Energy Policy Act of 2005 that seek to facilitate the construction of vital energy infrastructure projects, such as new electric transmission lines and gas pipelines.

II. Analyses Presented by the Tribes' Experts Have Focused Attention on the "Renewals Pass-through Issue," Ignoring Other Significant Impacts of Current ROW Regime

A. Impact of Current ROW Regime on Tribal Trust Lands

Several of the tribes' May 15, 2006 responses to the DOE/DOI request for submissions analyze the extent to which ROW renewal fees for existing pipelines and transmission lines on tribal trust lands can be passed through to consumers, calculate the pass through amount and express it as a fraction of the average residential customer's gas or electricity bill. However, these analyses alone cannot tell us the full impact of current ROW policy on tribal trust lands because they do not account for all of the costs associated with this policy.

As explained in detail in FAIR's previous submission, current ROW policy on tribal trust lands allows for (1) monopoly pricing of usage rights on tribal trust land and (2) periodic renegotiations of contracts for assets that have already been placed in or on the ground.[1] From a public policy perspective, the most important impact of current policy on consumers is that it distorts and suppresses companies' investment incentives with respect to energy transportation infrastructure. Below, we describe these distortions in more detail.

First, under the current regime, energy transporters have a strong incentive to route their new pipelines and transmission lines around tribal trust land. For new projects, the extra expense associated with routing around tribal trust lands can cause some otherwise attractive projects to appear unprofitable. Moreover, the projects that do get built are likely to traverse less direct routes and consume more resources. To the extent that alternative sites are national parks and wildlife refuges, projects that do get built will also be more costly to the environment, as discussed further below. Many energy transportation providers have had the incentive to remain silent about their build around decisions due to the threat of impending renewals.[2] Nevertheless, we have learned of several costly build around decisions made by companies seeking to avoid tribal trust lands.

In a study that was commissioned by the Interstate Natural Gas Association of America (INGAA), the trade association for the North American interstate natural gas pipeline industry, several companies reported that they avoid locating on Native American lands and usually seek an alternative.[3] Sempra's submission provides two case studies on this issue. The Sempra Submission discusses the Sunrise Powerlink Project, a $1.4 billion 500 kV electric transmission line that is being built across the Anza-Borrego Desert State Park to avoid the Santa Ysabel reservation and the uncertainties associated with ROW fee

[1] http://1813.anl.gov/documents/docs/ScopingComments/Fair_Access_to_Energy_Coalition.pdf at Exhibit A, p. 6.
[2] See e.g., http://1813.anl.gov/documents/docs/ScopingComments/INGAA.pdf, see p. 6.
[3] http://1813.anl.gov/documents/docs/ScopingComments/INGAA.pdf, see attachment at p. 24.

renewals once the project has been installed. As noted by Sempra, this route around the Santa Ysabel reservation adds significant cost and 5 miles of length to the project.[4] Moreover, Sempra notes that the Sunrise Powerlink Project is a replacement for a link that SDG&E had originally planned to install in 2001. This project, the Valley-Rainbow Interconnect, was eventually cancelled, at least partly due to the activities of the Pechanga Band of Luiseno Indians.[5]

Second, the current regime provides incentives for energy transporters to uproot their existing facilities and build around, causing consumers to pay for the same high cost facilities twice. For example, consider the EPNG pipeline on the Navajo Nation. Today, the Navajo Nation is asking EPNG to pay $22 million per year in ROW fees (with inflation adjustments) for a 20 year ROW. Under the current ROW pricing regime, EPNG could expect its fees to increase by 50% or more with each successive 20 year negotiation, given the rate of price increase that it has already experienced.[6] At this rate, the present value of the first 60 years of ROW payments (assuming a 5% real interest rate) would be more than $540 million. An appraiser has determined that the fair market value (FMV) of a ***permanent*** easement for EPNG's pipeline and facilities on the Navajo Nation is $1.2 million.[7] It is important to recognize that this FMV represents a single ROW payment for all time as opposed to the annual fee requested by the Navajo Nation.

Even if the FMV-based price of ROW fees for the off-reservation build-around route were many times this $1.2 million figure, it would still be advantageous for EPNG to spend more than $500 million dollars to build around the Nation if it expected the current regime to persist. Moreover, this half billion dollar cost would be a pure social waste, incurred only to relocate costly facilities that consumers have already paid for.

As noted above, many companies may not have had the incentive to share their stories of relocating facilities due to impending negotiations with tribes. However, it is our understanding that pipelines with far less extensive facilities on tribal trust lands than EPNG face similar concerns. For example, we understand that Questar removed at least a portion of its pipeline from trust land held by the Morongo tribe.[8] Sempra states that it may be in a similar position when easements for SoCalGas' pipelines on the Morongo tribal land expire in twelve years.[9] Noting that these pipelines supply 40% of the natural gas used in Southern California, Sempra states that "Relocating SoCalGas' pipelines on the Morongo tribal land would result in the abandonment of 24 miles of pipeline and require the construction of longer pipelines, most likely through difficult terrain in the

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[4] http://1813.anl.gov/documents/docs/ScopingComments/Sempra_Energy_Utilities.pdf at p. 2.
[5] Ibid.
[6] The Navajo calculate that the $22 million per year offer is a 57% increase over the 1995 agreement after adjusting for inflation (see http://1813.anl.gov/documents/docs/NavCom/D-1-NN_Case_Study-EPNG.pdf at page 15). Additional evidence presented in the INGAA case study of El Paso and the Navajo Nation indicates that the ROW fees have more than doubled on average every twenty years. http://1813.anl.gov/documents/docs/ScopingComments/INGAA.pdf, at p. 9.
[7] EPNG Appraiser's Report.
[8] http://1813.anl.gov/documents/docs/ScopingComments/Sempra_Energy_Utilities.pdf at p. 3.
[9] Ibid.

San Jacinto Wilderness Game Preserve, although this may not be feasible and other, still longer routes may need to be explored."[10]

The discussion above is consistent with findings presented by INGAA and the Edison Electric Institute (EEI), which is a trade association comprised of shareholder-owned electric utilities that serve 71% of all electric utility customers in the U.S. At least one of the respondents to the survey commissioned by INGAA had actually relocated facilities away from Native American lands.[11] Similarly, EEI related in its 1813 submission that it also: "... became aware of several instances where companies elected to terminate negotiations and move their facilities off of tribal lands".[12]

Third, although many tribes have asserted in this proceeding that their activities have never stopped the flow of energy from a pipeline or transmission line,[13] significant energy transportation infrastructure projects in the U.S. have been delayed and even cancelled due to tribal activities pursuant to the current ROW policy regime. As discussed above, Sempra has documented how a major electric transmission line was scuttled by the tribal negotiation process, significantly delaying a potentially important power link.[14] Idaho Power also discusses how the current policy can lead to construction delays.[15]

A tribal ROW policy that eliminated these distortions would improve companies' incentives to build the right amount of infrastructure in the right places at the right times for the lowest possible cost. All else equal, the impact of this move will be seen by consumers in two ways: (1) lower utility rates arising from projects that do get built and (2) more transportation options available sooner and in more cost-effective locations. The more transportation options that are available, the lower the prices that consumers will pay for both gas and electric power.[16]

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[10] Ibid.

[11] http://1813.anl.gov/documents/docs/ScopingComments/INGAA.pdf, see attachment at page 24. Note that due to confidentiality restrictions, no details are available regarding the company or tribe involved.

[12] http://1813.anl.gov/documents/docs/ScopingComments/Edison_Electric_Institute.pdf at page 13.

[13] See e.g., http://1813.anl.gov/documents/docs/ScopingComments/Ute_Indian_Tribe_Case_Study.pdf, Analysis Group Report at p. 7, and http://1813.anl.gov/documents/docs/ScopingComments/Jacarilla_Apache_Nation_Revised_Position_Paper.pdf at page 13 and 14.

[14] See http://1813.anl.gov/documents/docs/ScopingComments/Sempra_Energy_Utilities.pdf, p.2. Moreover, it is possible that many of the pipelines and transmission lines that traverse tribal trust lands today would never have been built under the current ROW negotiation regime.

[15] See http://1813.anl.gov/documents/docs/ScopingComments/Idaho_Power.pdf.

[16] Electric power costs can suffer two impacts as a result of current policy. First, current policy can impact the delivered price of gas, a key input in electricity production for owners of gas-fired plants. Second, current policy can impact the delivered price of electricity by taxing electric power lines that connect to consumers.

B. The Current ROW Regime on Tribal Trust Lands Conflicts with Policy Changes Intended to Facilitate Construction of New Energy Transportation Infrastructure

There appears to be a growing recognition in the U.S. policy community that policies that distort, delay and/or deter investments in energy transportation infrastructure militate against the national objective of ensuring a secure, sustainable, reliable and affordable energy future. In its June 2006 White Paper, the National Commission on Energy Policy (NCEP), a non-governmental bipartisan group of 20 energy specialists funded by the Flora and William Hewlett Foundation, identified the top five areas in which "current or anticipated siting challenges will most directly affect the evolution of future energy systems."[17] These top five areas include "intra- and interstate electricity transmission" and "natural gas facilities, including pipelines, storage, gathering systems, and processing facilities, as well as LNG regasification and storage facilities...".[18]

According to the NCEP White Paper, there has been a long term trend of declining investment in the nation's electric transmission system, which may have recently begun to change. Nevertheless, the NCEP White Paper finds that "current levels of [transmission] investment are modest considering the size of the grid and the need for substantial expansion to concurrently address growth in demand and to reduce congestion. Even at projected levels of $7-$10 billion per year by 2010, transmission investments are expected to lag, in proportionate terms, behind investment in generation capacity."[19]

For natural gas, "needed pipeline expansions are not projected to be large in the context of the nation as a whole, but may be significant in particular regions that either (1) need expanded pipeline systems to meet high demand growth or (2) that expect to expand production and will need additional capacity to deliver new supplies to market. Overall, EIA [Energy Information Association] forecasts that natural gas pipeline capacity into New England and the Pacific region must increase by over 60 percent and 45 percent respectively between now and 2020. Pipeline capacity going out of the producing areas in the Mountain West will also need to increase on the order of 60 percent in the same timeframe. Implementing capacity expansions of this magnitude will require numerous pipeline projects, each of which will involve regulatory processes of varying complexity depending on the affected locality."[20]

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[17] See Siting Critical Energy Infrastructure: an Overview of Needs and Challenges, a White Paper prepared by the staff of the National Commission on Energy Policy, June 2006 at p. 3, hereinafter referred to as NCEP study.

[18] Ibid.

[19] Ibid. at p. 17.

[20] Ibid. at pp. 14-15. Similarly, Professor Paul Joskow, an internationally recognized energy economist at M.I.T., noted in a recent study of U.S. energy policy that one of the major challenges to future natural gas pipeline projects involves local opposition to new pipeline facilities: "While the Natural Gas Act gives FERC substantial siting authority (unlike the situation with electric transmission facilities), state and local authorities are still a force to deal with. While the 'Nimby' syndrome has not yet been as significant a problem for gas pipelines as it has been for electric generation and transmission projects, the continued efforts to block local pipeline projects is a continuing concern. During the 1990s, the U.S. was able to

Recognizing these needs for increased investment in energy transportation infrastructure, several policies have been adopted to help companies address the many obstacles that currently distort, delay and deter such investment. For example, one of the provisions of the Energy Policy Act of 2005 (EPAct05) aims to reduce these obstacles through "...the creation of national energy corridors in the West that would alleviate the need to obtain redundant right-of-ways and reduce regulatory hurdles to the siting of different types of facilities [including electric transmission lines, oil and gas pipelines, and other related infrastructure] within these corridors."[21] The NCEP White Paper proceeds to describe a number of additional EPAct05 provisions that are aimed specifically at removing obstacles to investment in electric transmission lines.[22]

In their submissions, however, the tribes and their experts do not fully consider how investment in energy transportation infrastructure is delayed and/or deterred under the current tribal ROW policy regime. Instead, they tend to focus on the ability of companies to pass ROW fees on existing pipelines and transmission lines through to their customers. In essence, the tribes' arguments can be summarized as follows: when the taxes that tribes have the power to impose on energy transportation infrastructure are divided among a large number of ratepayers, the one source of increase in ratepayers' energy bills that the tribes have chosen to focus on is not large.

This argument could be and often is used as a rationale for many policies that harm the many to benefit the few. The key fallacy here is that the tribes have not addressed the full costs of their energy infrastructure tax on the public good; they have focused only on one aspect of that cost. With a fuller accounting of the costs associated with the current policy, it becomes clear that the current policy is not as harmless as the tribes' experts' analyses have indicated and that alternative means for funding tribal sovereign needs should be considered.

III. The Total Dollar Impact of ROW Renewal Fees for Existing Lines is Significant

A. Energy Transporters Subject to COS Regulation Have the Opportunity to Recover 100% of ROW Renewal Fees Charged by Tribes for Existing Lines

Despite assertions by some of the tribes' experts, energy transporters subject to COS regulation have the opportunity to pass on to their customers roughly 100% of the costs

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more fully exploit a gas and electric infrastructure that had excess supply capability at the beginning of the decade. The excess capacity has been used up (or more than used up). People may have become comfortable with increasing consumption without seeing major new supply projects. That era has come to an end and we are entering a period when conflicts over siting of energy supply facilities is likely to intensify once again." See e.g., Paul L. Joskow, *U.S. Energy Policy During the 1990s*, NBER working paper 8454 at pp. 31-32 (September 2001).

[21] See NCEP study at p. 9 and at p. 20.

[22] Ibid. at p. 20.

associated with expected increases in tribal ROW fees.[23] For example, EPNG is a COS-regulated interstate pipeline, whose main customers are local distribution companies (LDCs), intrastate pipelines, and large industrial customers. To the extent that LDCs and intrastate pipelines are also subject to COS regulation, they too will have the opportunity to recover 100% of any ROW cost increases that arise from their own encounters with tribal trust land, on top of any ROW costs embedded in transportation rates charged by EPNG.[24]

To address the renewal cost pass-through issue, EPNG's ratemaking staff has quantified the impact of the Navajo ROW fee increase alone on its customers.[25] The majority of EPNG's customers are intrastate pipelines, local distribution companies (LDCs) and large industrial customers located in the Southwest and Southern California. EPNG transportation charges include both a fixed portion (referred to as the capacity reservation charge) and a variable portion (referred to as a usage charge).

Under current ratemaking rules, ROW fees are included in the capacity reservation charge, which is by far the most significant charge on EPNG customers' bills.[26] EPNG has determined that five Arizona customers would pay roughly 40% of each dollar increase in Navajo ROW costs.[27] These customers are Southwest Gas, Salt River Project Agricultural Improvement and Power District, Arizona Public Service, UniSource Energy, and New Harquahala Generation Company, LLC.[28] These ROW costs are

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[23] Although EPNG as a COS regulated interstate pipeline will have the opportunity to recover 100% of these ROW cost increases from its customers, these costs increases will not be allocated evenly among EPNG customers. In markets with many competing gas transportation providers, EPNG's customers often receive discounted rates and may bear very little if any of the rate impact. However, EPNG is able to recover the total amount of the cost increase from customers that have few if any alternative transportation options. Such customers receive recourse (undiscounted) rather than discounted rates. If a natural gas pipeline had no customers in the latter category, there would be little economic rationale for its rates to be regulated.

[24] The regulation of the different stages of gas production has changed dramatically since the 1980s. Gas production is competitive and unregulated. Interstate pipelines, like EPNG, link producing wells with consuming areas and are subject to rate regulation administered by the Federal Energy Regulatory Commission (FERC). Interstate pipelines serve local distribution companies (LDCs), which sell gas to final users, as well as intrastate pipelines and large industrial customers. LDCs and intrastate pipelines are subject to rate regulation by state public utility commissions (PUCs).

[25] Of course, this potential $22 million per year renewal fee is not the only ROW renewal fee that EPNG and its customers will face over the next 15 years. It is our understanding that in that timeframe, EPNG must also renew ROW for its pipeline with numerous other tribes including the Laguna, Acoma, Southern Utes, GRICs, and Tohono O'odham. These negotiations could add many millions more to the ROW fees EPNG pays each year.

[26] It is our understanding that in the case of EPNG, the reservation charge comprises approximately 97% of a typical customer's annual invoice. Usage charges account for the remaining 3%.

[27] This analysis relies on EPNG's RP05-422 rate filing cost allocation/rate design methods and levels of billing determinants, with one exception. Given that Southern California Gas Company transitions to discount rate contracts as of 9/1/06, the SoCal portion of recourse rate increase calculated using the rate case levels of billing determinants was spread to all other customers proportionate to their share of the total increase without SoCal. This analysis does not include an estimate of potential re-allocation resulting from Article 11.2 (rate cap) application.

[28] New Harquahala Generating Company LLC is a 1050 megawatt natural gas fired power plant in Maricopa County, Arizona.

clearly significant for many of EPNG's customers. Moreover, it is our understanding that it is not uncommon for annual charges of far less than $22 million to be a source of contention in EPNG rate hearings.

Many of EPNG's customers purchase gas from other pipelines such as Transwestern that also face potential ROW cost increases in the near term. In addition, as discussed in detail below, a number of these companies face tribal trust land fee increases for ROW required by their existing pipeline and transmission lines, a fact completely ignored by the tribes' experts.

B. ROW Renewal Fees on Pipelines, Transmission Lines, and Distribution Facilities that Serve Consumers Directly

As noted above, there are a number of companies in the U.S. that serve residential customers directly and also face ROW renewals on their pipelines, transmission lines, and distribution facilities. One company that has raised this issue in the 1813 proceedings is PNM, a gas and electric utility in New Mexico, which faces approximately 95 renewals for its electric and gas ROW with numerous tribes over the next 15 years.[29]

In order to provide some insight into the potential costs that PNM may face as a result of these renewals, we consider a scenario in which PNM must pay ROW fees similar to those currently being requested from EPNG by the Navajo Nation, roughly $24,000 per mile per year. It is our understanding that PNM's electric transmission and distribution facilities cover about 3000 acres of various tribes' trust lands. Assuming the Navajo Nation ROW fee request of EPNG and converting miles to acres, we calculate a ROW fee of about $4,000 per acre per year.[30]

As a rate regulated utility, PNM has the opportunity to fully recover all of the costs associated with its ROW renewals from customers. To the extent that PNM's residential customers have no alternative to PNM's pipeline or electric transmission lines, they will fully bear the cost increases associated with tribal ROW renewal fees. Our analysis indicates that after the upcoming (approximately) 95 tribal ROW have been renewed, these cost increases could increase electric rates alone by as much as 5%.[31]

IV. Calculations Prepared by Tribes' Experts

[29] http://1813.anl.gov/documents/docs/ScopingComments/Public_Service_of_New_Mexico.pdf. Another company facing important known renewals is Sempra. Their easement for SoCalGas pipelines on Morongo tribal land expire in twelve years (http://1813.anl.gov/documents/docs/ScopingComments/Sempra_Energy_Utilities.pdf, page 3).

[30] To obtain this figure, we convert the per mile fee into a per acre fee by assuming a 50 foot ROW width. $24,000 per mile is consistent with the average and median ROW values reported in EEI's survey, see http://1813.anl.gov/documents/docs/ScopingComments/Edison_Electric_Institute.pdf at p. 9.

[31] Information on the number of electric customers is from http://www.pnm.com/about/home.htm.

As noted above, several of the tribes' May 15, 2006 responses to the DOE/DOI request for submissions focus on the issue of ROW renewal fees for existing pipelines and transmission lines on tribal trust lands. As discussed above, these analyses cannot tell us whether current ROW policy on tribal trust lands is or is not costly from a consumer's perspective because they do not address how current policy impacts transporters' investment incentives.

Even on the issue of ROW renewal fees for existing pipelines and/or transmission lines these various analyses arrive at conclusions that conflict with those outlined in Section III, as well as with one another. We briefly discuss these experts' analyses, highlighting the main ways in which we believe these analyses have erred in determining the extent to which ROW fees for existing lines can be passed through to customers, as well as the impact that these fees will have on customers' energy transportation costs.

A. Professor Cicchetti's Analysis on Behalf of the Navajo Nation

Professor Cicchetti focuses his analysis exclusively on the issue of renewal fees for EPNG's existing pipeline on the Navajo Nation. While this restrictive analysis could provide useful information on its own terms, it is important to recognize that the EPNG/Navajo renewal fee issue is but one manifestation of a much larger public policy issue. Professor Cicchetti's analysis does not address the impact on renewal fees on other interstate gas pipeline companies, let alone other types of energy transportation providers that are affected by this issue. Professor Cicchetti also does not consider the impact of any renewal fee negotiation on EPNG other than Navajo, despite the fact that EPNG has an additional 10 ROW negotiations on its horizon.[32] Nor does Professor Cicchetti consider the impact of tribal ROW fees charged directly to EPNG's customers, including several of the customers named above. Yet even if one were interested only in the impact of the Navajo fee increase on EPNG and its customers, Professor Cicchetti's analysis is unreliable for several reasons.

First, Professor Cicchetti's analysis does not use an appropriate comparable when calculating the impact of current tribal ROW policy on EPNG. His analysis focuses on the impact of raising rates from EPNG's offer of about $7 million per year to the Navajo asking price of about $22 million per year. However, EPNG's $7 million offer is based on its negotiating position under the current ROW pricing regime on tribal trust lands; this is not the FMV-based offer that EPNG would make to obtain usage rights on comparable privately-owned land.

To determine the impact of the current regime on EPNG costs, we must consider the FMV of EPNG's ROW on the Navajo Nation. As noted above, the FMV of a permanent easement or ROW on these lands was appraised at only $1.2 million. Today, the Navajo Nation is asking EPNG to pay $22 million per year in ROW fees (with inflation adjustments) for a 20 year ROW. Under the current ROW pricing regime, EPNG could

[32] Communication from EPNG 6/14/06.

well expect its fees to increase by 50% or more with each successive 20 year negotiation, as discussed in Section IIA. At this rate, the present value of the first 60 years of ROW payments (assuming a 5% real interest rate) would be more than $540 million.

Second, Professor Cicchetti's analysis does not consider the impact of EPNG's rate increase on its customers, e.g., LDCs and intrastate pipelines. Instead, his analysis focuses on the rate impact on the customers of EPNG's customers. As shown in Section IIIA, the impact on EPNG's customers is significant and can amount to large dollar values for individual customers each year.

B. Study by Dr. Tierney and Mr. Hibbard on Behalf of the Ute Indian Tribe of the Uintah and Ouray Reservation

We focus on the authors' analysis of ROW costs for existing gas pipelines in order to keep the discussion parallel to the analysis of these issues addressed in this submission. Even with this restricted focus, we identified three significant issues with this analysis.

First, the authors state in the executive summary "For the Western interstate gas companies we studied, tribal ROW costs make up a tiny share of pipeline costs, equaling around 2/1000th of 1% (for El Paso Natural Gas Company) to 34/1000th of 1% (for Mohave Pipeline Company)". However, these figures do not appear to reflect the share of tribal ROW costs in pipeline costs. Instead, they appear to be an estimate of tribal pipeline ROW costs as a fraction of California consumers' gas bills.[33]

Second, the analysis does not reflect the ROW costs that many companies expect to face as the ROW terms for their facilities expire. The figures used in the Tierney/Hibbard analysis appear to be derived from estimates of the portion of pipeline companies' costs associated with total ROW acquisition.[34] This source reflects the current costs of tribal ROW, many of which were negotiated decades ago. As these ROW are renegotiated, the energy companies most affected could see their annual ROW fees increase many times over.[35]

Third, the authors proceed to state that with gas transporters facing competition in many markets, "...it is not at all clear that customers would see even that tiny impact."[36] However, this statement ignores the regulatory rules that govern cost recovery in natural gas transportation markets, i.e., companies have an opportunity to recover in recourse rates all costs that cannot be recovered in competitive markets.

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[33] "For a California homeowner using 5Dth a month, on average the impact of tribal ROW falls in range of 0.1¢ and 1.6¢ per month, on average monthly bills that are about $47." http://1813.anl.gov/documents/docs/ScopingComments/Ute_Indian_Tribe_Case_Study.pdf, Analysis Group report, p. 43. Note that .001/47 is about 2/1000th of 1% and .016/47 is about 34/1000th of 1%.

[34] Ibid. p. 42.

[35] For example, see http://1813.anl.gov/documents/docs/NavCom/D-1-NN_Case_Study-EPNG.pdf at pp. 11 to 15.

[36] http://1813.anl.gov/documents/docs/ScopingComments/Ute_Indian_Tribe_Case_Study.pdf, Analysis Group report, p. 43.

C. Dr. Nesbitt's Analysis on Behalf of the Southern Ute Indian Tribe

Strikingly, and in contrast to the other submissions cited here, Dr. Nesbitt's analysis concludes that there is zero impact on consumers from tribal ROW fees: "No consumer in any downstream market is at all affected by the imposition of the tariff arising from the tribal ROW charges", "Any assertion that the tariff arising from the tribal ROW charges 'comes down on California or other gas consumers' is wrong".[37] However, these findings merely reflect the manner in which Dr. Nesbitt's model fails to capture how the production, transportation and distribution segments of the natural gas market are structured and regulated.

The results of Dr. Nesbitt's analysis appear to have been derived from a model in which the price of natural gas to delivered consumers is determined in a market with many buyers and many sellers. However, as explained in detail above, the transportation component of the delivered price of gas is, in large part, determined through the regulatory process. If transportation were fully competitive as Dr. Nesbitt's analysis implies, there would be no need for cost of service regulation in any segment of the gas industry, since the market alone would keep prices at competitive levels.

There are two key mechanisms through which increases in tariffs arising from higher tribal ROW charges can be passed on to consumers. First, consider the case of natural gas pipelines owned by an LDC that cross tribal trust lands. Most of the LDC's customers will have no alternative gas transportation service available.[38] Moreover, as a state-regulated franchise monopolist, the LDC has the opportunity to fully recover all of its cost increases in rates. Hence, if its ROW costs increase, the LDC will have the opportunity to recover 100% of these costs in its next rate hearing. Regardless of whether the LDC purchases gas in a competitive market, its customers will face higher prices due to the increased ROW fees.

Second, consider the case of an interstate natural gas pipeline such as EPNG. EPNG is regulated by the FERC precisely because some of its customers have no other practical source of natural gas other than EPNG. These customers may pay competitive prices for gas in source markets, but must contract with EPNG to have the gas delivered to them. These customers will typically pay the maximum tariff rate (i.e., the recourse rate) set by the FERC to ensure that EPNG does not abuse its monopoly power. As discussed earlier, this rate is set to provide the company with an opportunity to recoup its costs, including a competitive return on its capital. Thus, higher tribal ROW fees will lead to higher recourse rates for these captive customers.

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[37] http://1813.anl.gov/documents/docs/ScopingComments/Southern_Ute.pdf, Altos report, p.10.

[38] See for example http://www.eia.doe.gov/oil_gas/natural_gas/restructure/restructure.html. Note that even when it is possible to purchase gas independently, this gas is generally shipped through the LDC's pipes.

D. Analysis Prepared by The Affiliated Tribes of Northwest Indians (ATNI)

The ATNI attempt to quantify the pass through of tribal ROW fees by multiplying: 1) the average percentage of consumers' total energy bills spent on transportation costs, 2) the average percent of transportation costs spent on ROW acquisition, and 3) the approximate percentage of ROW that are on Indian lands. This analysis is misleading in three significant ways.

First, like the Tierney/Hibbard report, the ATNI analysis focuses on current payments for tribal ROW fees and does not consider the size of these payments on a going forward basis. Thus, the ATNI analysis significantly understates the extent to which consumers will bear increased ROW fees for existing facilities on a going forward basis. As mentioned above, many of the ROW fees currently included in transportation costs were negotiated decades ago when tribal ROW fees were much closer to FMV standards. As transporters' existing tribal ROW begin coming up for renewal, the fees paid could be significantly higher. In fact, the 1813 study was in large part motivated by the significant escalation in tribal ROW fee demands that is confronting numerous energy transportation providers.

Second, the share of ROW on Indian lands is not a good measure of the share of ROW costs due to tribal ROW fees. This is true both because tribal ROW fees can be many times higher than non-tribal ROW fees (for comparable property) and also because tribal ROW are temporary, while ROW on private lands are typically perpetual. Consider a pipeline that does not acquire new ROW. Eventually it will have completely depreciated the cost of its non-tribal ROW, but have continual ROW payments for its tribal ROW. For such a pipeline, tribal ROW cost would be 100% of all ROW cost no matter what the percentage of all ROW on tribal lands.

Third, the ATNI calculation spreads ROW costs equally across consumers. However, the true impact of tribal ROW fees falls unequally on customers, depending on their location (since current policy tends to present greater issues in the Western U.S.), and their access to competitive transportation options, among other factors. Hence, this analysis does not capture the range of increase consumers will face. While some energy consumers may be essentially unaffected by tribal ROW fee increase, others will see much higher increases.

E. Analysis Prepared by the Jicarilla Apache Nation

In its submission, the Jicarilla Apache Nation calculates the fraction of the wellhead value of gas produced by Reservation wells between 1976 and 1995. The Nation appears

to take this small fraction, less than 3/100th of 1%, as an indication that it has been under-compensated for its land.[39]

The finding that a tribe has received minimal compensation for the ROW it has provided to energy transporters is not, in and of itself, an indication that the tribe was unfairly treated in some way.[40] On the contrary, under an FMV standard, one would expect minimal compensation to be paid for ROW so long as the land usage rights imposed no significant cost on the owner. For example, the FMV of ROW costs for a pipeline buried underground on land that has been and will continue to be used for sheep grazing should be minimal to the extent that sheep grazing is not significantly impacted by the presence of a buried pipe.

In order to determine whether a tribe has received less than the FMV associated with its ROW, it is necessary to compare fees paid to independent appraisals of the compensation required to keep the tribe whole for its providing land usage rights to the energy transporter. Additional information that can be helpful in such an analysis is the amount that private landowners received on similar lands at the time the ROW was granted. In the case studies submitted by INGAA, there is no evidence that tribes were ever paid below FMV for the ROW they provided and current ROW charges are often large multiples of FMV.[41]

V. Conclusion

Submissions prepared by the tribes and their experts tend to focus on only one cost associated with the current policy—the extent to which companies can pass through to their customers ROW renewal fees for existing pipelines and transmission lines. These submissions largely ignore how current policy distorts and suppresses companies' incentives to invest in energy transportation infrastructure and creates incentives for them to uproot infrastructure that is already in or on the ground.

These distortionary impacts are not simply theoretical in nature; important real world examples exist and it is likely that more would be available if companies did not have the incentive to remain silent due to the threat of impending ROW negotiations with tribes. Moreover, there appears to be a growing recognition in the U.S. energy policy community that new approaches are needed to remove market distortions that frustrate the construction of vital energy infrastructure projects.

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[39] http://1813.anl.gov/documents/docs/ScopingComments/Jacarilla_Apache_Nation_Revised_Position_Paper.pdf p. 17.

[40] For other tribes that believe that ROW fees should reflect the economic value of the ROW to the energy company see, e.g., http://1813.anl.gov/documents/docs/ScopingComments/Southern_Ute.pdf, p. 3, and http://1813.anl.gov/documents/docs/ScopingComments/Shoshone-Bannock_Tribes.pdf, p. 9.

[41] For additional utilities evidence regarding payments in excess of FMV see, e.g., http://1813.anl.gov/documents/docs/ScopingComments/Idaho_Power.pdf and http://1813.anl.gov/documents/docs/Presentations/apr06mtg/BPA18134-19-06.pdf, slides 25 to 29.

However, even if we take the perspective of the tribes' submissions and focus only on the degree to which renewal fees for existing facilities can be passed on to customers, we find that energy transporters subject to cost of service (COS) regulation have the opportunity to recover 100% of these fees through rate increases and that the dollar impact of such fees can be significant.

EXHIBIT C

State Standards for Valuing Rights-of-Way

COLORADO

I. Eminent Domain: Constitutional, Statutory, and Case Law Standards

Similar to many other Constitutions, Art. II Sec. 15 of the Colorado Constitution states "private property shall not be taken or damaged, for public or private use, without just compensation." Somewhat unique to Colorado, this constitutional provision goes on to specifically state the forums which have the power to determine "just compensation." It can be ascertained by a board of commissioners comprised of "not less than three freeholders," a jury, or by a court. Art. II, Sec. 15.

The Colorado Legislature has essentially codified Art. II Sec. 15 under Title 38 of the Revised Statutes. C.R.S. § 38-1 *et seq.* Under Title 38, the Colorado legislature also specifically grants the power of eminent domain to pipeline companies. C.R.S. § 38-4-102. As a "designated carrier," the pipeline company can claim a right of way across both public and private lands. C.R.S. §§ 38-5-102 and 104. A designated carrier must provide "due and just compensation" to the property owners, and if a price cannot be agreed upon, then the price must be determined "in the manner provided by law for the exercise of the right of eminent domain." C.R.S. § 38-4-107.

Though Colorado statutory law specifies which entity determines "just compensation" (a board, jury or court), statutory law does not specify how the value of "just compensation" is to be determined. C.R.S. § 38-1-1. Rather, the law simply states that the "true and actual value" of the property must be awarded at the time of the taking. C.R.S. § 38-1-114. If an entire tract of land is condemned, "the amount of compensation to be awarded is the reasonable market value of the said property on the date of valuation." C.R.S. § 38-1-114(b).

Though the specific valuation process can at times be arcane, Colorado case law establishes these basic principles. Starting with the earliest case law on the subject, the measurement of just compensation is the actual diminution of market value sustained by the property. *City of Denver v. Bayer*, 7 Colo. 113 (1883); s*ee also Leadville Water Co. v. Parkville Water Dist.*, 164 Colo. 362 (1967) (just compensation has been commonly defined as payment to the owner of the fair and reasonable market value of the property.). Market value generally means the price the property would have brought if sold under usual and ordinary circumstances, and it reflects the value of the landowner's lost interest and not the taker's gain. *Williams v. City & County of Denver*, 147 Colo. 195 (1961). *See also Fowler Irrevocable Trust v. City of Boulder,* 17 P.3d 797 (2001) (just compensation is how much would the property bring in cash if offered for sale by one who desired but was not obligated to sell, and was bought by one who was willing but not obligated to buy.). When a part of the landowner's property is taken for

public use, just compensation includes payment for the value of what is taken and compensation for injury to the rest of the property. *La Plata Elec. Ass'n v. Cummings*, 728 P.2d 696 (1986). This injury to the property is also measured according to market value, that is the property's drop in market value because of the taking. *Mack v. Board of County Com'rs of Adams County*, 152 Colo. 300 (1963).

II. State Grants of Rights-of-Ways

There are various types of state lands through which a utility right of way ("ROW") can pass. In Colorado, the largest category of such land falls under the control of the Colorado State Board of Land Commissioners. This land was given to Colorado by the federal government, and the Colorado Legislature created the Land Board in order to regulate this land. C.R.S. § 36-1 *et seq.* As for ROW grants, the Land Board determines the application (procedure) and valuation process.

According to several state officials who work for the Land Board, the Board has been fairly free to determine its own application and valuation process. As for the valuation of the ROW, it has long been assumed that it is based on a market standard. However, there are no specific regulations addressing this topic or protocols issued by the Land Board discussing valuation issues. In the past, the valuation process was performed by an outside private appraiser. Only until recently has the Land Board taken over the valuation process, and there is now a current effort to issue general standards concerning the valuation process.

The valuation process for state ROWS in Colorado depends in part on the industry seeking the right of way (pipeline, telecommunications, etc.), and that it does consider how other entities (be it state or private) value similarly situated land. It should be noted that the ROW's valuation by the Land Board could be different than the valuation done by county or state assessors for tax purposes, or the valuations done by different state departments that regulate other state lands through which utility ROWS could pass. In Colorado, there is no uniform or centralized valuation process which would cover all state lands for both ROW and taxation purposes.

Finally, if there is ever a dispute as to the location and actual necessity of an ROW whether on state or private land, the legislature has granted the state court system the power to make this determination. C.R.S. § 38-1-101. In the pipeline context, the statutory law has further specified what the court must consider in making this determination. C.R.S. § 38-1-101.5.

CALIFORNIA

In California, public entity right of way acquisitions, including those involving the State of California, are secured via negotiated transactions and via a public entity's eminent domain powers. The eminent domain statute in California is located at Code of Civil Procedure ("CCP") Sections 1230.010 et seq. ("Statute").

In addition to the Statute, public entities seeking to acquire a right of way must also satisfy the requirements of the Constitutions of the United States and California. The Constitutions of the United States and California mandate that a public entity pay "just compensation" to property owners when it acquires a right of way via its eminent domain powers. (United State Constitution, 5th Amendment; California Constitution, Article I, Section 19.) In California, "just compensation" has been interpreted to mean "fair market value". CCP Section 1263.320 defines "fair market value" as follows:

"(a) The fair market value of the property taken is the ***highest price*** on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available." (Emphasis added.)

The courts have commonly referred to this concept as the "highest and best use" or "highest and most profitable use". For example, the Court in City of San Diego v. Neumann (1993) 6 Cal.4th 738, 744, stated the following:

"As section 1263.320 indicates, the fair market value of property taken has not been limited to the value of the property as used at the time of the taking, but has long taken into account the 'highest and most profitable use to which the property might be put in the reasonably near future, to the extent that the probability of such a prospective use affects the market value.' [citations.]"

Similarly, the value of the property to the condemnor or the proposed use of the condemnor is not considered, unless it is consistent with the highest and best use as contemplated by the courts. Nichols on Eminent Domain provides the following:

"The just compensation to which an owner is entitled when his property is taken by eminent domain is regarded in law from the point of view of the owner and not the condemnor. In other words, just compensation in the constitutional sense is what the owner has lost, not what the condemnor has gained." (4-12 Nichols on Eminent Domain Section 12.03.)

There are three valuation methods that appraisers use to determine the fair market value of a property. These methods include the market sales, income capitalization and cost replacement approaches. The market sales approach consists of comparing the subject property to recently sold similar properties in the vicinity. The income capitalization approach consists of determining the anticipated net income of the subject property by considering the property's actual rental income, as well as the rental income for comparable properties in the vicinity,

property expenses, and allowances for vacancy and collection losses. Finally, the cost replacement approach consists of estimating the current cost of replacing the subject property, with adjustments for depreciation, the value of the underlying land, and entrepreneurial profit. The market sales approach is accepted as the standard valuation method in California. (Redevelopment Agency v. First Christian Church (1983) 140 Cal.App.3d 690, 697-698.)

Once the public agency has determined the fair market value of the subject property, the public agency is compelled to offer to purchase the subject property from the private property owner for the subject property's full appraised fair market value. (Government Code Section 7267.2.) If the public agency and the property are unable to reach an agreement for the purchase and sale of the subject property, the public agency must notice and hold a public hearing for the consideration of the adoption of a resolution of necessity to acquire the subject property via the public agency's eminent domain powers prior to filing a complaint in eminent domain. (CCP Section 1245.230.) At trial, the jury determines the amount of just compensation to be awarded.

Where applicable, public agency's may also be liable for additional costs related to the acquisition of the subject property including severance damages (CCP Sections 1263.410-450), loss of business goodwill (CCP Sections 1263.510-530), value of improvements (CCP Sections 1263.205-270) and relocations costs (25 California Code of Regulations Sections 6000 et seq. and Government Code Sections 7260 et seq.)

ARIZONA

Condemnation of property is provided in Article 2, Section 17 of the Arizona Constitution; which states that "[n]o private property shall be taken or damaged for public or private use without just compensation." The State of Arizona acquires rights of ways or easements through the eminent domain statutes (A.R.S. §12-1111 *et seq.*), the eminent domain statutes for public works (A.R.S. §12-1141 *et seq.*), or the transportation statutes related to condemnation (A.R.S. §28-7091 *et seq.*). Under these statutes, Arizona generally values rights of way based on market value principles. Arizona does not impose an administrative process on the state agent prior to the condemnation proceeding, nor does it provide for arbitration should the parties disagree on the valuation.

All actions for condemnation shall be brought as a civil action in the superior court in the county in which the property is located and the action is entitled to precedence over other civil actions. However, prior to filing a condemnation action, the condemner must deliver to the property owner a written offer to purchase the interest in the property including an amount as just compensation based on one or more appraisals. A.R.S. §12-1116(A) and A.R.S. §28-7098(B). Once in an eminent domain or condemnation proceeding, the value of the interest in property taken and the amount of severance damages become questions of fact. *City of Phoenix v. Wilson*, 200 Ariz. 2, 21 P.3d 388 (2001). The court or jury must ascertain the value of the property sought to be condemned and the value of each and every separate estate or interest in the property. A.R.S. §12-1122(A)(1). These values are determined by ascertaining the most probable price estimated in terms of cash that the property would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable. A.R.S. §12-1122(C) and A.R.S. §28-7091. The three traditional appraisal approaches for determining market value recognized by Arizona courts are the "income approach," the "market data" or sales approach, and the "cost approach." *Mobil Oil v. Phoenix Central Christian Church*, 138 Ariz. 397, 400, 675 P.2d 284, 287 (Ct. App. 1983). However, if the character of the property precludes an ascertainment of market value, consideration may be given to the value peculiar to the owner through replacement cost or any other method which would yield fair compensation for damages. *State ex rel. Herman v. Southern Pac. Co.*, 8 Ariz. App. 238, 445 P.2d 186 (App. 1968). In addition, the property owner may be entitled to severance damages calculated by the difference between the fair market value of the remaining property before and after the taking. *Pima County v. Palos Companies Unlimited*, 140 Ariz. 481, 682 P.2d 1148 (App. Div. 2 1984). The appeal and review of verdicts in condemnation proceedings follow standard processes for civil actions under Arizona law.

Arizona law has separate statutes concerning eminent domain for public works projects. A.R.S. §12-1141 *et seq.* A federal agency, state public body or authorized corporation may institute condemnation proceedings for the acquisition of real property in the superior court in a county in which any part of the proposed public work is located and the action is entitled to precedence over other civil actions. A.R.S. §12-1142. Notice of the action by publication, posting and filing is required prior to the hearing on the validity of the proceedings. A.R.S. §12-1145. At the hearing, the court determines all issues of fact and law except the amount of

damages for which it appoints a special master. A.R.S. §12-1147. The special master then provides notice to interested parties and holds a hearing to determine the amount of damages and compensation for the taking and to determine the persons entitled to the compensation. A.R.S. §12-1149. The court then hears objections to the special master's report and determines a final judgment which may be appealed by a person in the action who has properly filed an exception. A.R.S. §12-1153.

UTAH

Condemnation of property for public purposes is provided for in Art. I. Sec. 22 of the Utah Constitution; which states that "[p]rivate property shall not be taken or damaged for public use without just compensation." Based upon this provision, the Utah legislature has enacted a number of statutes addressing eminent domain actions. *See* U.C.A §§ 63-90-1, *et seq.*, 63-90a-1, *et seq.*, 72-5-405 and Utah Admin. Code R933-1-1. Of these various enactments, only one bears directly on the condemnation of property for purposes related to the provision of mineral transportation services, i.e. U.C.A. §§ 78-34-1 *et seq.* (the "Statute"). Under the Statute, the right of eminent domain may be exercised in behalf of, amongst other things, "[a]ll public uses authorized by the Government of the United States" and "gas, oil or coal pipelines." U.C.A. §78-34-1(1) and (6).

Prior to initiating an eminent domain action, the party seeking to acquire property by condemnation must "make a reasonable effort to negotiate for the purchase of the property." U.C.A. § 78-34-4.5. Failing a purchase of property, the condemner may commence an eminent domain procedure in the appropriate State district court, *see* U.C.A. § 78-34-6; whereupon the condemnee "may submit the dispute for mediation or arbitration to [a] private property ombudsman [in accordance with U.C.A. § 63-34-13]," U.C.A. § 78-34-21(1). Regardless of the forum in which just compensation is determined:

> The court, jury or referee . . . must ascertain and assess:
>
> (1) the value of the property sought to be condemned . . .; and
>
> (2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages [that] will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned . . . .

U.C.A. §78-34-10.

Whether performing a valuation of property under the Statute or determining "just compensation" pursuant to Art. I, Sec. 22, case law establishes that the amount to be paid a condemnee is the fair market value of the condemned property. *See State v. Ward*, 112 Utah 452, 189 P.2d 113 (1948) (A condemnee is to be paid only so much as will compensate him for damages to his property.); *State v. Cooperative Sec. Corp. of Church of Jesus Christ of Latter Day Saints*, 122 Utah 134, 247 P.2d 269 (1952) (The compensation to which an owner is entitled is the difference in the fair market value of his property before and after the taking.); *Southern Pac. Co. v. Arthur*, 10 Utah 2d 306, 352 P.2d 693 (1960) (The standard for just compensation is ordinarily the market value of the property taken); *State v. Noble*, 6 Utah 2d 40, 305 P.2d 495 (1957) (The value of condemned land is to be based on the market value.); *Wasatch Gas Co. v. Bouwhuis*, 82 Utah 573, 26 P.2d 548 (1933) (In determining the value of a perpetual easement, it is not the value of the easement acquired but the value of the lands or interests taken from the landowner and the damage to lands injuriously affected and not taken.); *Utah DOT v. Rayco*

Corp., 599 P.2d 481 (Utah 1979) (The measure of severance damages to the remainder is the difference between fair cash market value before and after the taking.); *City of Hilldale v. Cooke*, 28 P.3d 697, 424 Utah Adv. Rep. 55 (2001) (The measure of damages is the market value of the property and the formula for determining fair market value is what would a purchaser willing to buy but not required to do so, pay and what would a seller willing to sell but not required to do so, ask.).

IDAHO

I. Eminent Domain

A. Standards

Article I, Section 14 of the Idaho Constitution declares that private property may be taken for public use "but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore." Any use necessary to complete the development of material resources of the State are declared by the Constitution to be public uses. Article XI, Section 8, extends the power of eminent domain to cover corporate real property.

Interestingly, the Idaho Supreme Court issued its version of the *Kelo* decision in 1972 when it held that a downtown redevelopment agency could condemn private property for an urban renewal project, even though the majority of the buildings would be constructed by and occupied by private commercial enterprises. *See Boise Redevelopment Agency v. Yick Kong Corp.*, 499 P.2d 575 (1972). The Supreme Court noted in its decision that Idaho's Constitution was broader than most state constitutions in granting eminent domain authority to private entities such as irrigation and mining businesses. In response to *Kelo*, and some 34 years after the Idaho Supreme Court decision, the Idaho Legislature this year passed anti-*Kelo* legislation.

Idaho's eminent domain statute sets out detailed instructions for exercising the authority and the powers of the Court in determining eminent domain cases. The power may be exercised on behalf of the public uses, including oil and gas pipelines and electrical transmission. Attached is Idaho Code § 7-711 that instructs the Court to ascertain and assess the damages from an eminent domain proceeding, and the factors to be considered. I.C. § 7-711A, also attached, requires state agencies to advise property owners of their legal rights in condemnation. I.C. § 58-1103 permits state agencies to condemn buildings and other real property improvements and requires the tenant to be paid the greater of (1) fair market value of the improvements that the improvements contribute to the fair market value of the real property acquired, or (2) fair market value of the improvements when removal of the improvement is considered in the appraisal.

B. Procedures

The state commences proceedings to exercise eminent domain authority by filing an action in the district court for the county in which the property is situated. I.C. § 7-706. The statute specifies the contents of the complaint, including an allegation that the state made a good-faith effort to purchase the lands sought to be taken or to settle with the owner for the damages which might result to his property from the taking and was unable to make any reasonable bargain. This requirement applies when the owner of the land sought to be taken resides in the county in which the lands are situated. *See* I.C. § 7-707(7).

II. State Grants of Rights-of-Way

This portion of the analysis is analogous to the context of Section 1813 where a private party seeks a right-of-way across the lands of the sovereign state of Idaho. The Idaho State

Board of Land Commissioners ("Land Board"), consisting of the Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, and State Comptroller, is authorized by statute to grant rights-of-way across state lands for electrical lines, gas pipelines, other public utilities, highways, and for other purposes. *See* I.C. § 58-603.

A. Standards

This authority is exercised by the Idaho Department of Lands consistent with statutes and the Idaho Administrative Procedures Act ("IDAPA"). The portion of IDAPA dealing with easements on state-owned lands is attached (IDAPA § 20.03.08). The Department of Lands, with the concurrence of the legislature, amended this portion of IDAPA this year, including a modification of the definition of "market value" to be:

> The most probable price at a specified date, in cash, or on terms reasonably equivalent to cash, for which the property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.

IDAPA 20.03.08.010.07.

Ironically, this definition of market value is not used elsewhere in this section of IDAPA. Instead, the regulations refer to "land value" as seen in the chart defining appropriate compensation for a variety of uses including pipelines and power lines. *See* IDAPA 20.03.08.021.02. Regardless of whether it is called market value or land value, the regulation requires compensation up to one hundred percent (100%) of that value, subject to various additional considerations set forth in the compensation table.

B. Procedures

An appraisal of the easement may be required where the easement value exceeds $500.00. IDAPA 20.03.08.021.03. The appraisal is usually performed by departmental staff. At the request of the applicant, and with the agreement of the Director of the Department of Lands, the applicant for the right-of-way may provide an appraisal acceptable to and in compliance with specifications set by the Director. *Id.* at .04.

If an applicant for right-of-way feels aggrieved by a decision of the Director of the Department of Lands under the rules, the applicant can request a hearing before the Land Board within thirty (30) days. IDAPA 20.03.08.003. The Director of the Department of Lands retains discretion over whether to grant an easement across state lands. *Id.* at .020.04.

WYOMING

Wyoming Standards for Negotiating and Valuing State Rights-of-Way

The State of Wyoming has the authority to purchase or condemn any real estate for any "necessary public purpose." WYO. STAT. ANN. § 1-26-801(a) (LexisNexis 2005). By implication, the authority to purchase a fee interest includes the right to purchase a lesser interest, such as a right-of-way. *See, e.g. id.* § 24-6-106 (giving the state highway authorities permission to purchase private property, including easements if a fee interest cannot be obtained). Prior to any purchase of property for a state purpose, the state agency purchasing the property must consult with the State Building Commission ("SBC") to determine whether state-owned property is available for the proposed use. *Id.* § 9-5-105(a); SBC Rules and Regulations, Ch. IX, Sec. 1. The purchasing agency must provide the Department of Administration and Information, General Services Division ("GSD") with a written proposal to purchase. SBC Rules and Regulations, Ch. IX, Sec. 1(a). If the GSD determines that there is no suitable state land available for the proposed purpose, it will authorize the state agency to initiate negotiations for the purchase of the property with the private property owner. *Id.* Sec. 1(d).

The State is required to "make reasonable and diligent efforts to acquire property by good faith negotiation" before pursuing condemnation. WYO. STAT. ANN. § 1-26-509(a). In acquiring the property through negotiations, the State should include discussion of the following factors:

> (i) Any element of valuation or damages recognized by law as relevant to the amount of just compensation payable for the property;
> (ii) The extent or nature of the property interest to be acquired;
> (iii) The quantity, location or boundary of the property;
> (iv) The acquisition, removal, relocation or disposition of improvements . . . ;
> (v) The date of proposed entry and physical dispossession;
> (vi) The time and method of payment; and
> (vii) Any other terms or conditions deemed appropriate by either of the parties.

Id. § 1-26-509(b). Negotiations that take into account the statutory factors will be considered prima facie evidence of "good faith." *Id.* § 1-26-510. In negotiating a value for the property, the State is guided by the Wyoming Constitution, which provides, "Private property shall not be taken or damaged for public or private use without *just* compensation." WYO. CONST. art. I, § 33 (emphasis added). Before purchasing the property, the State must obtain final approval from the SBC. SBC Rules and Regulations, Ch. IX, Sec. 2.

Should negotiations fail, the court will assess "fair market value" for the property. *Id.* § 1-26-702(a). "Fair market value" is defined as "the price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy." *Id.* § 1-26-704(a)(i). If there is no relevant market for the property, its fair market value can be "determined by any method of valuation that is just and equitable." *Id.* § 1-

26-704(a)(ii). For a partial taking, such as a right-of-way, the fair market value is equal to the greater of (1) the value of the property taken or (2) the difference between the fair market value of the entire property immediately before and after the taking. *Id.* § 1-26-702(b). The landowner has the burden of proving "fair market value" at trial. *Conner v. Bd. of County Comm'rs, Natrona County*, 2002 WY 148, ¶ 25, 54 P.3d 1274, 1284 (Wyo. 2002). "The effect of this statutory scheme is to permit the landowner to establish the appropriate amount of just compensation for a partial taking by any rational method so long as he is able to introduce competent evidence to that end." *L.U. Sheep Co. v. Bd. of County Comm'rs of County of Hot Springs*, 790 P.2d 663, 672 (Wyo. 1990).

EXHIBIT D

Tribal Eminent Domain Statutes

As a rule, Tribal Codes permit the pertinent tribal government to condemn lands of its respective land base and pay the condemnee under a standard of either (i) fair market value ("FMV"), (ii) "just compensation;" or (iii) an "appraised value." In each instance, the tribal government has enacted a system that mirrors the process employed by States and the United States to set FMV as the rubric for valuing land to be taken.

Those Codes which refer to "just compensation" do so, presumably, as a result of 25 U.S.C. § 1302(5), which reads:

> No Indian tribe in exercising powers of self-government shall – (5) take any private property for a public use without just compensation; . . . .

At least two courts have ruled that the "just compensation" standard is to be interpreted in accordance with general principles in the United States Constitution. *See Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978) (25 U.S.C. §§ 1301-1303 is modeled after the Constitution of the United States and is to be interpreted in light of constitutional law decisions.); *Loncassion v. Leekity*, 334 F. Supp. 370 (D.N.M. 1971) (Law governing actions against individuals for damages under United States Constitution Amendments 4 and 5 should be applied to 25 U.S.C. § 1302.). This being the case, it can be easily argued that "just compensation" under 25 U.S.C. § 1302(5) is to be interpreted as that phrase is understood in Federal condemnation actions, *i.e.*, FMV.

The accompanying tribal codes include those of the: (1) Kalispell Tribe of Washington; (2) Coeur d' Alene Tribe of Idaho; (3) Cow Creek Tribe; (4) Fort McDowell Mohave-Apache Indian Community; (5) Salt River Pima-Maricopa Indian Community; (6) Absentee Shawnee Tribe of Oklahoma; (7) Cheyenne-Arapahoe Tribes of Oklahoma; (8) Sisseton-Wahpetan Sioux; and (9) Eastern Band of Cherokee Indians (collectively referred to as the "Codes").

LAW AND ORDER
CODE OF THE KALISPELL TRIBE OF INDIANS
WASHINGTON

CHAPTER 15

EMINENT DOMAIN

SECTION 15-1: PETITION FOR ACQUISITION - CONTENTS

15-1.01 PETITION FOR ACQUISITION - CONTENTS

Whenever any body representing the Tribe is authorized by the Business Council to acquire any land, or other property, deemed necessary for the public uses of the Tribe, the attorney general shall present to the Tribal Court a petition in which the land, or other property sought to be acquired shall be described with reasonable certainty, and setting forth the name of every owner, who can be ascertained from B.I.A. Realty records, the reason for which the property is to be acquired, and requesting that the court determine the compensation to be made to the owner or owners, for taking the land, or other property.

SECTION 15-2: NOTICE - CONTENTS - SERVICE - PUBLICATION

15-2.01 NOTICE - CONTENTS - SERVICE - PUBLICATION

A notice stating briefly the object of the petition and containing a description of the land, or property sought to be acquired, and stating the time and place when and where the same will be presented to the Tribal Court, shall be served on each and every person named as owner, at least ten (10) days previous to the time designated in the notice for the presentation to the Court of the petition. The service shall be made by delivering a copy of the notice to each of the persons or parties so named, if a resident of the reservation; or, in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of such notice at his or her usual place of abode; with some person of more than sixteen years of age. In case of persons under the age of eighteen years, with their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such person; in case of idiots, lunatics or distracted persons, on their guardians, or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In all cases where the owner or person claiming an interest in such real property is a nonresident of this reservation, or where the residence of such

owner or person is unknown, an affidavit of the attorney general shall be filed that such owner or person is a non resident of this reservation or that after diligent inquiry his residence is unknown or cannot be ascertained, service may be made by publication in the tribal newsletter and in any newspaper published in Pend Oreille County for two successive publications. Such publication shall be deemed service upon each nonresident person or persons whose residence is unknown. The notice shall be signed by the attorney general of the Kalispel Tribe. The notice may be served by any competent person eighteen years of age or over. Due proof of the service of such notice by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of the Tribal Court before or at the time of the presentation to the Court of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served, but all persons or parties having been served with notice as provided, either by publication or otherwise, shall be bound by the subsequent proceedings.

SECTION 15-3: ADJOURNMENT OF PROCEEDINGS - FURTHER NOTICE

15-3.01 ADJOURNMENT OF PROCEEDINGS - FURTHER NOTICE

The court may upon application of the attorney general or any owner or party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interest may be affected.

SECTION 15-4: HEARING - ORDER ADJUDICATING PUBLIC USE

15-4.01 HEARING - ORDER ADJUDICATING PUBLIC USE

At the time and place for hearing the petition, or to which the hearing may have been adjourned, if the court has satisfactory proof that all parties interested in the lands, or other property described in the petition have been duly served with the notice, and is further satisfied by competent proof that the contemplated use for which the lands, or other property are sought to be acquired is really necessary for the public use of the Tribe, it shall make and enter an order, to be recorded in the minutes of the court, and which order shall be final unless review to the Tribal Court of Appeals is taken within five days after entry thereof, adjudicating that the contemplated

use for which lands or other property are sought to be appropriated is really a public use of the Tribe.

SECTION 15-5: ORDER TO DIRECT DETERMINATION OF DAMAGES AND OFFSETTING BENEFITS

15-5.01 ORDER TO DIRECT DETERMINATION OF DAMAGES AND OFFSETTING BENEFITS

The order shall direct that determination be made of the compensation and damages to be paid all parties interested in the land or other property sought to be acquired together with the injury, if any, caused by such taking to the remainder of the lands or other property from which the acquisition is to be taken after offsetting against all such compensation and damages the special benefits, if any, accruing to the remainder by reason of the use by the Tribe of the lands and other property described in the petition. The determination shall be made within thirty days after the entry of the order.

SECTION 15-6: ORDER FOR IMMEDIATE POSSESSION - PAYMENT OF TENDER INTO COURT

15-6.01 ORDER FOR IMMEDIATE POSSESSION - PAYMENT OF TENDER INTO COURT

In case the Tribe shall require immediate possession and use of the property sought to be condemned, and in order of necessity shall have been granted, and no review has been taken therefrom, the attorney general may stipulate with respondents for an order of immediate possession and file with the clerk of the court a certificate of the Tribe's requirement of immediate possession of the land, which shall state the amount of money and terms offered to the respondents and shall further state that such offer constitutes a continuing tender of such amount. The attorney general shall file a copy of the certificate with the office of financial management, which shall issue and deliver to the clerk of the court a sum sufficient to pay the amount agreed to by the parties or an adequate amount as determined by the Court. The court without further notice to respondent shall enter an order granting to the Tribe the immediate possession of the

property described in the order of necessity, which order shall bind the petition to pay the full amount of any final judgment of compensation and damages which may thereafter be awarded for the taking of the lands, or other property described in the petition and for the injury, if any, to the remainder of the lands, or other property from which they are to be taken from, after offsetting against all compensation and damages the special benefits, if any, accruing to the remaining lands. The moneys paid into court may at any time after entry of the order of immediate possession, but withdrawn by respondents, by order of the court, as their interests shall appear.

SECTION 15-7: DETERMINATION OF ADEQUACY OF PAYMENT - COSTS

15-7.01 DETERMINATION OF ADEQUACY OF PAYMENT - COSTS

The amount paid into court shall constitute just compensation paid for the taking of the property: PROVIDED, That respondents may, in the same action, request a trial for the purpose of assessing the amount of compensation to be made and the amount of damages arising from the taking. At the trial, the date of valuation of the property shall be the date of entry of the order granting to the Tribe immediate possession and use of the property. If, pursuant to such hearing, the court awards respondents an amount in excess of the tender, the court shall order the excess paid to respondents with interest thereon from the time of the entry of the order of immediate possession, and shall charge the costs of the action to the Tribe. If pursuant to the trial, decision of the court awards respondents an amount equal to the tender, the costs of the action shall be charged to the Tribe, and if the verdict or decision awards an amount less than the amount of the tender, the Tribe shall be taxed for costs.

SECTION 15-8: DEMAND FOR TRIAL - TIME OF TRIAL - DECREE OF ACQUISITION

15-8.01 DEMAND FOR TRIAL - TIME OF TRIAL - DECREE OF ACQUISITION

If any respondent shall elect to demand a trial for the purpose of assessing just compensation and damages arising from the taking, he shall so move within sixty days from the date of entry of the order of immediate possession and use, and the issues shall be brought to trial within one year from the date of such order unless good an sufficient proof shall be offered and it

shall appear to the court that the hearing could not have been held within a year. In the event that no such demand be timely made or brought to trial within the limiting period, the court, upon application of the Tribe shall enter a decree of acquisition for the amount paid into court as the total sum to which respondents are entitled, and such decree shall be final and nonappealable.

SECTION 15-9: ACQUISITION WHEN SEVERAL OWNERSHIPS

15-9.01 ACQUISITION WHEN SEVERAL OWNERSHIPS

Whenever it becomes necessary on behalf of the Tribe to acquire by condemnation more than one tract of land, property, or property rights, and held in different ownerships or interests, the Tribe may consolidate and file a single petition as one action against the several tracts of land, property, or property rights held by said different ownerships or interests, setting forth separately the descriptions of the tracts of land, property, or property rights needed, and the owners, persons, or parties interested therein.

15-9.02 PUBLIC USE

At the time and place appointed for hearing the petition, the court may enter an order adjudicating public use as affecting all tracts of land, property, or property rights as described therein, which order shall be final as to those respondents not seeking a review to the court of appeals within five days after entry thereof.

15-9.03 SEPARATE TRIALS

Thereafter, if requested by the Tribe, the Tribal Court may decide to hear and determine in separate trials, the amount of compensation and damages, if any, that shall be paid for the different tracts, parcels, property, or property rights, as set forth in the petition.

SECTION 15-10: TRIAL - DAMAGES TO BE FOUND

15-10.01 TRIAL - DAMAGES TO BE FOUND

A judge of the Tribal court shall preside at the trial to determine the compensation and damage to be awarded, by reason of the acquisition and use of the lands, or other property sought to be acquired. Upon the trial, witnesses may be examined in behalf of either party to the

proceedings as in civil actions; and a witness served with a subpoena in each proceeding shall be punished for failure to appear at such trial, or for perjury, as upon a trial of a civil action.

15-10.02 DAMAGES TO BUILDINGS

If there is a building standing, in whole or in part, upon any land to be taken, the judge shall add to the findings the value of the land taken, and the damages to the building. If the entire building is taken, or if the building is damaged, so that it cannot be readjusted to the premises, then the measure of damages shall be the fair market value of the building. If part of the building is taken or damaged and the building can be readjusted or replaced on the part of the land remaining, the Tribe agrees thereto, then the measure of damages shall be the cost of readjusting or moving the building, or the part thereof left, together with the depreciation in the market value of the building by reason of such readjustment or moving.

15-10.03 DAMAGES TO BUILDINGS - WHERE BASED ON READJUSTMENT OR MOVING

If damages are based upon readjustment or moving of building or buildings, the court shall order and fix the time in the judgment and decree of acquisition within which any such building must be moved or readjusted. Upon failure to comply with said order, the Tribe may move the building upon respondent's remaining land and recover its costs and expenses incidental thereto. The Tribe shall have a lien upon the building and the remaining land from the date of the judgment and decree of acquisition for the necessary costs and expenses of removal until the order of the court has been complied with. The amount of the lien and satisfaction thereof shall be by application and entry of a supplemental judgment in said proceedings and execution thereon.

SECTION 15-11: JUDGMENT - DECREE OF APPROPRIATION - RECORDING

15-11.01 JUDGMENT - DECREE OF APPROPRIATION - RECORDING

At the time of rendering judgment for damages, whether upon default or trial, the judge shall also enter a judgment or decree of appropriation of the land, real estate or premises sought for acquisition, thereby vesting the legal title to the same in the Kalispel Tribe. Whenever said judgment or decree of acquisition is made, a certified copy of such judgment or decree of

acquisition may be filed for record in the Realty office of the Bureau of Indian Affairs, Spokane Agency.

SECTION 15-12: PAYMENT OF DAMAGES - EFFECT - COSTS - APPEAL

15-12.01 PAYMENT OF DAMAGES - EFFECT - COSTS - APPEAL

Upon the entry of judgment upon the decision of the court awarding damages, the Tribe may make payment of the damages and the costs of the proceedings by depositing them with the clerk of the court, to be paid out under the direction of the judge and upon making such payment into court of the damages assessed and allowed for any land, or other property mentioned in the petition, and of the costs, the Tribe shall be released and discharged from any and all further liability therefor, unless upon appeal the owner or party interested recovers a greater amount of damages; and in that case, the Tribe shall be liable only for the amount in excess of the sum paid into court and the costs of appeal.

In the event of an appeal by any party to the proceedings, the moneys paid into the Tribal court by the Tribe pursuant to this section shall remain in the custody of the court until the final determination of the proceedings by the court of appeals.

SECTION 15-13: CLAIMANTS, PAYMENT OF - CONFLICTING CLAIMS

15-13.01 CLAIMANTS, PAYMENT OF - CONFLICTING CLAIMS

Any person, claiming to be entitled to any money paid into court, may apply to the court and upon furnishing evidence satisfactory to the court that he is entitled to the money, the court shall make an order directing the payment to such claimant the portion of such money as he shall be found entitled to; but if, upon application, the judge should decide that the title to the land, or premises specified in the application of such claimant was in such condition as to require that an action be commenced to determine the conflicting claims thereto, he shall refuse such order until such action is commenced and the conflicting claims to such land or premises be determined according to law.

SECTION 15-14: APPEAL

15-14.01 APPEAL

Either party may appeal from the judgment for damages entered in the Tribal court, to the court of appeals of the Tribe, within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the court of appeals the propriety and justness of the amount of damages in respect to the parties to the appeal: PROVIDED, HOWEVER, That upon such appeal no bond shall be required: AND PROVIDED FURTHER, That if the owner of land, or premises accepts the sum awarded by the court, he shall be deemed thereby to have waived conclusively an appeal to the court of appeals, and final judgment by default may be rendered in the Tribal court as in other cases: PROVIDED FURTHER, That no appeal shall operate so as to prevent the Tribe from taking possession of such property pending such appeal after the amount of said award shall have been paid into court.

SECTION 15-15: AWARD, HOW PAID INTO COURT

15-15.01 AWARD, HOW PAID INTO COURT

Whenever the attorney general shall file with the financial manager a certificate setting forth the amount of any award found against the Tribe under these provisions, together with the costs of said proceedings, and a description of the lands and premises sought to be acquired, and the title of the action or proceeding in which said award is rendered, it shall be the duty of the office of financial management to forthwith issue a check upon the Tribal Treasury to the clerk of court in money the amount of said award and costs.

COEUR D'ALENE
TRIBAL CODE

CHAPTER 33

EMINENT DOMAIN

33-1.01 Authority

This act is adopted pursuant to the inherent reserved sovereignty of the Coeur d'Alene Tribe of Idaho (Tribe) over the lands within the exterior boundaries of the Coeur d'Alene Indian Reservation (Reservation) which the Tribe has held from time immemorial and pursuant to the authority delegated to the Tribe by the United States.

33-2.01 Power To Condemn

The Tribe hereby exercises its power to condemn and acquire through eminent domain any property, real or personal, or any interest therein, within the exterior boundaries of the Reservation, so long as such property is taken for a public purpose under the procedures set forth herein which provide due process of law and just compensation for taking as required by 25 USC 1302.

33-3.01 Public Purposes

The following purposes are public purposes for which property may be condemned or acquired through eminent domain.

a) Promotion of the health, safety or welfare of the Tribe or its members;

b) Protection or full utilization of the natural resources of the Reservation or the Tribe;

c) Economic development of the Tribe or the Reservation which benefits, directly or indirectly, the Tribe or its members;

d) Maintaining the integrity of the Reservation by:

1) Preventing allotments from going out of trust;

2) Consolidating fractionated shares or undivided interests of allotments on the Reservation; or

3) Returning to Tribal ownership former Tribal lands or allotments which had gone out of trust or Indian ownership, or any interests therein, regardless of whether

known; provided, however, that prior to any hearing involving compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in the condemned property whose names can be ascertained by reasonably diligent search of the records, considering the character and value of the property involved and interest to be acquired, and also those whose names have been otherwise learned. Lienholders on the property shall not be made parties to the proceedings, nor shall they have any right of participation or intervention other than to share in the damages as the Court may determine.

33-5.02 Summons

Upon the filing of the complaint the Court shall issue a summons which shall be served on each and every person named as owner or otherwise interested therein. Additional summonses shall be directed to and served upon defendants subsequently added.

The summons shall state the Court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may file with the Court and serve upon the plaintiff's attorney an answer within 20 days of service of the summons, and that the failure to so file and serve an answer constitutes a consent to the taking and to the authority of the Court to proceed to fix the compensation. The summons shall conclude with the name of the plaintiff's attorney and address.

33-5.03 Answer

If a defendant has any objections or defense to the taking of the property, the defendant shall serve an answer within 20 days after the service of summons upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all of the defendant's objections and defenses to the taking of the property. The defendant waives all defenses and objections not so presented.

33-5.04 Trial

Trial on any objections or defenses raised and on the issue of just compensation and the amount of damages to be paid all parties interested in the land, real estate, or other property sought to be appropriated for the taking shall be determined by the Tribal Court without a jury.

c) A statement of the estate or interest in said property taken for said public use;

d) A plan showing the property taken;

e) A statement of the sum of money estimated to be just compensation for the property taken.

33-6.02 Resolution Required

A declaration of taking pending trial shall not be filed in the Tribal Court unless the issue has been presented to the Coeur d'Alene Tribal Council for determination 1) that the property should be taken pending trial, 2) of the sum of money estimated to be just compensation for the property taken, and 3) authorization by the Tribal Council to deposit said amount into the Tribal Court.

33-6.03 Deposit In Court - Vesting Of Title

Upon the filing of said declaration of taking and the deposit in the Court to the use of the person(s) entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said property in fee simple absolute, or such other or lesser estate or interest therein as specified in said declaration, shall vest in the Tribe and said property shall be deemed to be condemned and taken for the use of the Tribe. The right for just compensation for the same shall vest in the persons entitled thereto. The total amount of the compensation due shall be determined by the Court and awarded by the Court in pending proceeding.

33-6.04 Pre-payment Of Amount Deposited

Any party in interest may apply and the Court may order that the money deposited in the Court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. Such application shall not waive any right to appeal. If the compensation finally awarded in respect to said lands, or any parcel thereof, shall exceed the amount of money so received by any person entitled, the Court shall enter an Order directing the Tribe to pay the amount of the deficiency, plus 12% interest.

33-6.05 Duty Of The Court

Upon the filing of a declaration of taking, the Court shall immediately order the parties in possession to surrender possession to the petitioner for therewith unless it finds that manifest injustice would result thereby. The Court shall have power to make such orders in respect to encumbrances, liens, rents, taxes assessments, insurance, and other charges, if any, as shall be just and equitable.

COW CREEK

COW CREEK BAND OF UMPQUA TRIBE OF INDIANS

TRIBAL LEGAL CODE

TITLE 255

Eminent Domain

255-10 Authorization and Repeal of Inconsistent Legislation.

The Cow Creek Band of Umpqua Tribe of Indians is organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984); the provisions of the Cow Creek Band of Umpqua Tribe of Indians Recognition Act of December 29, 1982 (P.L. 97-391), as amended by the Cow Creek Band of Umpqua Tribe of Indians Distribution of Judgement Funds Act of October 26, 1987 (P.L. 100-139); and the Cow Creek Tribal Constitution, duly adopted pursuant to a federally supervised constitutional ballot, on July 8, 1991.

Pursuant to Article III, Section 1 of the Tribe's Constitution, the Cow Creek Tribal Board of Directors is the governing body of the Tribe. Pursuant to Article VII, Section 1 (d) of the Tribe's Constitution, the Board has the power to "administer the affairs and assets of the Tribe". Pursuant to Article VII, Section 1 (g) of the Tribe's Constitution, the Board has the power to "manage all economic affairs and enterprises of the Tribe...". Pursuant to Article VII, Section 1 (i) of the Tribe's Constitution, the Board has the power to "enact ordinances and laws governing the conduct of all persons or tribally-owned land; to maintain order and protect the safety, health, and welfare of all persons within the jurisdiction of the Tribe; and to enact any ordinances or laws necessary to govern the administration of justice, and the enforcement of all laws, ordinances or regulations...". Pursuant to Article VII, Section 1 (m) of the Tribe's Constitution, the Board has the power "purchase or accept any land or other property for the Tribe." Pursuant to Article VII, Section 1 (p) of the Tribe's Constitution, the Board has the power to "deal with questions concerning the encumbrance, lease, use, management, assignment, zoning, exchange, mortgage, purchase, acquisition, sale placement in trust and disposal of land and other assets owned by, or held in trust for, the Tribe; and regulate land use and development in areas within the Tribe's jurisdiction". Pursuant to Article VII, Section 1 (t) of the Tribe's Constitution, the Board has the power "have such other powers and authority necessary to meet its obligations, responsibilities, objectives, and purposes as the governing body of the Tribe." Pursuant to Article X of the Tribal Constitution, the Board has the power to "...establish a tribal judiciary system and provide or authorize support for that system".

Pursuant to the foregoing and the Tribe's retention of the full spectrum of sovereign powers, the Board has the authority, desires to and does hereby establish this Title 255 for the purpose of providing a procedure for taking private property for public use which protects the rights of all parties; protecting and maintaining the ability to control and administer infrastructure, and real and personal property rights necessary to aid or assist the exercise of government within tribal jurisdiction; and for the purposes of facilitating economic development of the reservation.

Any prior Tribal regulations, resolutions, orders, motions, legislation, codes or other Tribal laws which are inconsistent with the purposes and procedures established by this Title 255 are hereby repealed to the extent of any such inconsistency.

Title 255 is intended to advance the sovereign self governance of the Tribe, illustrate the Tribes desire and ability to make and be ruled by its own laws, and to protect the political integrity, economic security and health and welfare of the Tribe.

Source: Tribal Board of Directors Resolution No. 2001-30, Dated May30, 2001.

Comment:

255-20 Definitions

As used in this Title 255:

(a) "Date of Taking" is that date set forth in the Resolution, or the date of filing of the Resolution. The Date of Taking shall not be earlier than the date of filing of the Resolution. On the Date of Taking the Subject Property automatically transfers to the Tribe by act of law.

(b) "Estimated Just Compensation" means the fair market value of the property, as the asset exists at the date of taking, as evidenced by at least one independent appraisal of the property as of the date of taking and other relevant evidence of the property value as of the date of taking.

(c) "Partial Taking" means the taking of a geographical part of a Respondent's interest in real property that is contiguous and used as a single parcel.

(d) "Respondent" entity or person from which a property interest was taken.

(e) "Subject Property" means the real and/or personal property rights taken, including any permanents structures and appurtenances attached to real property, unless such structures or appurtenances are excepted in the description of the taken Subject Property.

(f) "Tribe" means, and "Tribal" refers to, the Cow Creek Band of Umpqua Tribe of Indians

Source: Tribal Board of Directors Resolution No. 2001-30, Dated May30, 2001.

Comment:

255-30 Eminent Domain

Pursuant to titles VII and X of the Tribal Constitution, the Tribe, by action of the Cow Creek Tribal Board of Directors, may hereby invoke the power of eminent domain exclusively pursuant to the procedure hereby established as Title 255 of the Tribal Code at any time the Tribal Board of Directors determines, in their discretion, that private property is necessary for a tribal public purpose.

Source: Tribal Board of Directors Resolution No. 2001-30, Dated May30, 2001.

Comment:

255-40 Procedures for Eminent Domain

(a) Upon determination that public property is necessary for a tribal public purpose, the Tribal Board of Directors may pass a Resolution with the statements listed herein. Such Resolution shall then be filed with the Clerk of the Tribal Court. The Resolution shall be accompanied by the Estimated Just Compensation in the form of checks, written to all owners of the Subject Property right holders, in the amount of the fair market value of each owner's interest in the property.

(b) The Resolution shall contain the following statements:

1) A statement that the Subject Property is within the territorial jurisdiction of the Tribal Court.

2) A statement that the Tribal Court shall have original jurisdiction over the subject action, such statement to reference Section 1-20-020 of Title 1 of the Tribal Code.

3) A finding that the Subject Property is necessary for a tribal public purpose and the reasons therefore.

4) A detailed description of the Subject Property. Such description shall be a surveyed legal description if real property, and may contain exceptions for property rights not taken, such as water rights, grazing rights, or leases. If personal property, such description shall be specific enough to provide the owner of the property with full notice of the taking.

5) The term for which the Subject Property is taken, either as a term of years or in perpetuity.

6) The Date of Taking.

7) A listing of all current holders of property interests in the Subject Property, the nature of their interests, and the Estimated Just Compensation afforded to each.

8) Any other statement necessary for the record.

(c) Within 7 calendar days of filing such Resolution, the Clerk of the Tribal Court shall send notice, by certified mail, return receipt requested, to each current holder of interests in the Subject Property of the eminent domain action. Such notice shall include

1) A copy of the filed Resolution.

2) A copy of this Tribal Code Section 255.

3) A cover letter describing the action and containing the name of a point of contact within the Tribe who shall be responsible for prosecuting the taking on behalf of the Tribe.

4) The independent appraisal, and any other evidence used to determine Estimated Just Compensation.

5) The Notice of Due Date for Answer issued by the Clerk of the Tribal Court.

Source: Tribal Board of Directors Resolution No. 2001-30, Dated May30, 2001.

Comment:

255-50 Tribal Court Procedures

The Tribal Court Procedures for eminent domain actions are as follows:

(a) Within 2 business days of the filing of a Resolution as described above with the Clerk of the Tribal Court, the Clerk of the Tribal Court shall issue a Notice of Due Date for Answer, such date to be approximately 45 days from the date of filing.

(b) The Clerk of the Tribal Court shall hold all checks for Estimated Just Compensation in their custody until the Due Date for Answer.

(c) On the Due Date for Answer, all Respondents may submit an Answer to the Filing raising any legal issues regarding the filing. If any Respondent raises the issue that the taking is invalid, the Clerk of the Tribal Court shall continue to hold the checks. If no Respondent makes such a claim, or when the claim is resolved in favor of the Tribe, the checks shall be issued to the Respondents.

(d) If the taking is determined to be a valid taking, or if no claim is made that the taking is invalid, the only remaining issue for determination by the Tribal Court is just compensation.

(e) If the Respondent Answers that the Estimated Just Compensation is inadequate, a Discovery and Hearing schedule shall be established to provide the Respondent with due process for determining just compensation. In no event shall just compensation be determined to be less than Estimated Just Compensation.

(f) If any Respondent does not submit an Answer, the Tribal Court shall issue an Order that just compensation is equal to the Estimated Just Compensation for that Respondent. If the Respondent does not challenge the Order, with good cause for the late challenge within 30 calendar days, the Tribal Court shall close the file for that action. Any such challenge raising the issue that the taking is invalid shall be rejected if the filing of such challenge is not accompanied by a return of the Estimated Just Compensation, to be held by the Tribal Court until such claim is resolved.

Source: Tribal Board of Directors Resolution No. 2001-30, Dated May30, 2001.

Comment:

255-60 Determining Just Compensation

(a) Just Compensation shall be determined as of the Date of Taking.

(b) Just Compensation shall be determined by the trier of fact by appraisal evidence submitted by the parties to the action, and may be determined by other evidence submitted by the parties, such as testimony of the Respondents. Just Compensation will be based on the highest and best use of the Subject Property on the Date of taking.

(c) The just compensation for a Partial Taking shall be based on the value of the Subject Property actually taken plus or minus the damages or benefits to the remainder. If the valuation is deemed to be an overall benefit to the remainder, the just compensation shall be the value of the Subject Property actually taken.

Source: Tribal Board of Directors Resolution No. 2001-30, Dated May30, 2001.

Comment:

255-70 Effective Date

This Title 255 shall be effective imediately upon adoption hereof by Resolution by the Tribal Board of Directors.

Source: Tribal Board of Directors Resolution No. 2001-30, Dated May30, 2001.

Comment:

255-80 Severability.

If any section, or any part thereof, of this Title 255 or the application thereof to any party, person or entity in any circumstances shall be held invalid for any reason whatsoever by a court of competent jurisdiction or by federal law, the remainder of such section or part of this Title 255 shall not be affected thereby and shall remain in full force and effect as though no section or part thereof has been declared to be invalid.

Source: Tribal Board of Directors Resolution No. 2001-30, Dated May30, 2001.

Comment:

255-90 No Waiver of Sovereign Immunity.

Nothing in this Title 255 shall provide or be interpreted to provide a waiver of the sovereign immunity of the Tribe or any of its officers, employees and/or agents acting within the scope of their authority. To the extent not inconsistent with applicable federal law, no forum, court or agency, other than those of the Tribe, shall have jurisdiction over any matter or dispute relating to the interpretation of this Title 255.

Source: Tribal Board of Directors Resolution No. 2001-30, Dated May30, 2001.

Comment:

FORT McDOWELL
MOHAVE-APACHE
INDIAN COMMUNITY

Sec. 20-117 - 20-130. RESERVED.

ARTICLE VIII. EMINENT DOMAIN

Sec. 20-131. DEFINITIONS.

As used in this Article:

(a) "Condemnation" means the process and actual taking of property or interest therein, temporarily or permanently, for public or quasi-public use through the power of eminent domain.

(b) "Condemnee" means the owner, assignee, lessee, tenant, authorized occupant, or other holder of property or interest therein taken by condemnation.

(c) "Eminent domain" means the power of the Tribe to condemn property for public or quasi-public use.

(d) "Property" means all lands, including improvements and fixtures thereon; lands under water; surface and subsurface rights; every estate, interest, and right, legal or equitable, in lands, water, or the subsurface; all rights, interests, privileges, easements, and encumbrances relating thereto, including tenancies and liens of judgement, mortgage, or otherwise; and any portion of these.

Sec. 20-132. PURPOSES FOR WHICH EMINENT DOMAIN MAY BE EXERCISED.

Subject to the provisions of this Article and any other applicable law, the right of eminent domain may be exercised by the Tribe for the following uses:

(a) Buildings and grounds for any public or quasi-public use of the Tribe including, but not limited to, economic enterprises of the Tribe;

(b) Reservoirs, canals, aqueducts, flumes, ditches or pipes, whether public, quasi-public or private, for conducting water for the use of the Tribe or the inhabitants of the territory of the Tribe or for drainage of any area within the territory of the Tribe;

(c) Raising the banks of streams, removing obstructions therefrom, or widening, deepening, or straightening their channels;

(d) Highways, toll roads, byroads leading from highways to residences and farms and other byroads, plank and turnpike roads, streets, alleys, and any other roads or ways for the use or benefit of the Tribe or its inhabitants;

(e) Telegraph and telephone lines and conduits for public communication;

(f) Electric light and power transmission lines, pipe lines used for supplying gas or waste disposal, and all transportation, transmission and intercommunication facilities;

(g) Aviation fields; and

(h) All other public and quasi-public uses.

Sec. 20-133. PREREQUISITES TO TAKING PROPERTY BY CONDEMNATION.

Before property may be condemned, it shall appear that:

(a) The use to which the property is to be applied is a use authorized by the laws of the Tribe;

(b) The taking is necessary to such use, *provided* the word "necessary" as used in this subsection shall not be interpreted to mean the only possible option or alternative, but shall mean a viable solution to a problem or opportunity; and

(c) If the property is already appropriated to some public or quasi-public use, the public or quasi-public use to which it is to be applied is a more necessary public or quasi-public use.

Sec. 20-134. PROPERTY SUBJECT TO CONDEMNATION.

Property which may be taken includes:

(a) All property belonging to, assigned to, leased, or occupied by any person or entity;

(b) Property appropriated to public or quasi-public use;

(c) All easements and rights of way;

(d) All rights of use, entry upon, and occupation of property;

(e) The right to remove or take earth, gravel, stone, trees, and timber from property;

(e) A use in the water of a stream, river, or spring; and

(f) All types of and interests, estates, and rights in property, private or otherwise, not enumerated.

Sec. 20-135. RIGHT OF TRIBE TO ENTER AND SURVEY PROPERTY.

(a) Where property is required for public or quasi-public use, the Tribe, or its authorized agents in charge of such use, may survey and locate property most appropriate for such use.

(b) Upon at least ten (10) days notice, the property may be entered upon to make examinations, surveys, and maps thereof, and the entry constitutes no cause of action in favor of the condemnees of the property.

Sec. 20-136. PROCEDURES FOR CONDEMNATION.

(a) All condemnations shall be authorized by resolution of the Tribal Council approved by a majority vote of the council members present *provided* such present council members constitute a quorum as required by the Constitution of the Tribe.

(b) The Tribal Council, before taking any action in condemning any property or interest therein, shall post notice thirty (30) days before the proposed action is to be taken at the Tribal Office and on the property itself so that interested persons will have an opportunity to appear before the Tribal Council to support or oppose the proposed action.

(c) Before condemning any property or interest therein, the Tribal Council shall make specific findings that:

(1) The purpose for which the property is to be taken is authorized by this Article;

(2) The prerequisites to taking property by condemnation under this Article have been met; and

(3) The property is subject to condemnation under this Article.

(d) The final resolution of the Tribal Council condemning the property shall include at least:

(1) A description of the property to be condemned;

(2) The specifics of the findings required by subsection (c) of this Section; and

(3) If applicable, a specific amount of fair and just compensation to be paid any condemnees of the property.

Sec. 20-137. ENFORCEMENT.

Upon issuance of a valid resolution condemning property or any interest therein by the Tribal Council, tribal law enforcement officers shall enforce such resolution, as necessary, by removing the condemnees, if any, and their personal property from the condemned property.

Sec. 20-138 - 20-140. RESERVED.

SALT RIVER
PRIMA-MARICOPA
INDIAN COMMUNITY

hearing the community court shall require that a final account and report be filed and served upon all parties served with the notice. The final account and report shall include an audit of the books and records of receivership. An opportunity for written objections to said account shall be provided. In the termination proceedings the court shall take such evidence as is appropriate and shall make such order as is just concerning its termination, including all necessary orders in regard to the fees and costs of the receivership.

(c) *Suspension; removal of receiver.* The community court may at any time suspend a receiver and may, upon notice, remove a receiver and appoint another. (Ord. No. SRO-98-85, 4-24-85)

Secs. 5-56—5-60. Reserved.

ARTICLE V. EMINENT DOMAIN*

Sec. 5-61. Purposes for which eminent domain may be exercised.

Subject to the provisions of this chapter and in accordance with Article III of the bylaws of the community, the right of eminent domain, also called condemnation, may be excised by the community to:

(a) Acquire all or any portion of any ownership interest in any real property or improvements located within the exterior boundaries of the community which ownership interest is held by any nonmember of the Salt River Pima-Maricopa Indian Community who is not an heir of an original allottee and which land is not subject to trust status.

(b) Acquire the leasehold interest of a lessee of community land for the purpose of using such land for roadway and utility corridors and other public purposes. (Ord. No. SRO-110-88, § 1, 2-17-88; Ord. No. SRO-125-89, § 1, 7-12-89)

*Editor's note—Inclusion of Ord. No. SRO-110-88, §§ 1—11, adopted Feb. 17, 1988, as Ch. 5, Art. V, §§ 5-61—5-71, was at the discretion of the editor.

Cross reference—Development, real property and housing, Ch. 17.

(d) *Deposit of money or bond.* The money or bond may be deposited with the community treasurer at the election of the plaintiff and held for the use and benefit of each person having an interest in each parcel of land sought to be condemned, subject to final judgment after trial of the action, and held also as a fund to pay any further damages and costs recovered in the proceedings, as well as all damages sustained by the defendant if for any cause the property is not finally taken. The deposit of the money or bond shall not discharge the plaintiff from liability to maintain the fund in full but it shall remain deposited for all accidents, defalcations or other contingencies, as between the parties to the proceedings, at the risk of the plaintiff, until the compensation or damage is finally settled by judicial determination, and the court awards such part thereof as shall be determined to the defendant or the treasurer is ordered by the court to disburse it.

(e) *Investment and disbursement of money or bond.* The treasurer shall receive the money or bond and return a receipt therefor to the court and the treasurer shall safely keep such deposit in a special fund to be entered on his books as the condemnation fund. The treasurer shall invest and reinvest the monies in the condemnation fund. The treasurer shall disburse the money deposited and, if necessary, convert such investments to cash for the purpose of making such disbursements or forfeit the bond as the court may direct pursuant to its judgment. After satisfaction of the judgment in a condemnation action, the excess, if any, of the deposit made regarding such action, including monies earned by the investment and reinvestment of such deposit, shall be returned by the treasurer to the plaintiff.

(f) *Amount of deposit.* The parties may stipulate as to the amount of deposit, or for a bond from the plaintiff in lieu of a deposit.

(g) *Rights of persons in interest.* The parties may stipulate that:

(1) The plaintiff deposit with the clerk of the court the amount in money for each person in interest which plaintiff's valuation evidence shows to be the probable damages to each person in interest; and

(2) Upon order of the court each person in interest may withdraw the amount which plaintiff has deposited for his interest.

(3) A reference to the complaint for descriptions of the respective parcels.

(4) Notice to defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint.

(b) The summons in all other particulars shall be as provided in civil actions and shall be served in like manner. (Ord. No. SRO-110-88, § 5, 2-17-88; Ord. No. SRO-125-89, § 5, 7-12-89)

Sec. 5-66. Right to defend action.

All persons occupying, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend in respect to his property or interest, or that claimed by him, as if named in the complaint. (Ord. No. SRO-110-88, § 6, 2-17-88; Ord. No. SRO-125-89, § 6, 7-12-89)

Sec. 5-67. Ascertainment and assessment of value, damages and benefits.

(a) The court shall ascertain and assess:

(1) In regard to eminent domain exercised under section 5-61(a) hereof, the value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein, and if it consists of different parcels, the value of each parcel and each estate or interest therein separately.

(2) In regard to eminent domain exercised under section 5-61(b) hereof, the value of the lessee's interest in the leasehold estate shall be limited by the more restrictive of (a) the uses allowed under the lease and (b) the uses permitted in the zoning of the land subject of the lease in force at the time the application was filed, and shall be further limited to the extent the considerations for the leasehold interest were less than the highest value obtainable as allowed under the provisions of 25 U.S.C. § 416. (Ord. No. SRO-110-88, § 7, 2-17-88; Ord. No. SRO-125-89, § 7, 7-12-89)

therein, or if not, then to take possession of and use the property until final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against plaintiff on account thereof.

(b) *Receipt of payment by defendants.* The defendant or defendants who are entitled to the money paid into court upon any judgment may demand and receive the money at any time thereafter upon an order of the court. The court shall, upon application, order the money so paid into court delivered to the party entitled thereto upon his filing either a satisfaction of the judgment or a receipt for the money, and an abandonment of all defenses to the action or proceeding except as to the amount of damages to which he may be entitled if a new trial is granted. Such payment shall be deemed an abandonment of all defenses, except the party's claim for greater compensation.

(c) *Custody of money paid into court.* The money paid into court on final judgment may be placed by order of court in the custody of the treasurer to be held or disbursed upon order of court, and plaintiff and such officers shall be subject to the same responsibility, liabilities and restrictions with respect thereto as provided in this article when money is paid into court by plaintiff upon application for possession before trial.

(d) *Costs of new trial.* When a new trial is granted upon application of a defendant, and he fails upon the trial to obtain greater compensation than was allowed upon the first trial, the costs of the new trial shall be taxed against him. (Ord. No. SRO-110-88, § 10, 2-17-88; Ord. No. SRO-125-89, § 10, 7-12-89)

Sec. 5-71. Costs.

(a) Costs may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

(b) If, prior to commencement of the action or proceeding, the community tenders to the owner of the property and/or improvements such sum of money as it deems the reasonable value of the property, or interests in property, and the owner refuses to accept it and transfer the property, then all costs and expenses of the action or proceeding shall be taxes against the owner unless the sum of money assessed in the judgment as the value of the prop-

erty and compensation to be paid therefor is greater than the amount so tendered. (Ord. No. SRO-110-88, § 11, 2-17-88; Ord. No. SRO-125-89, § 11, 7-12-89)

Secs. 5-72—5-80. Reserved.

ARTICLE VI. POLICE DEPARTMENT*

Sec. 5-81. Establishment.

(a) There shall be a Salt River Pima-Maricopa Indian Community Police Department which is responsible pursuant to the provisions of the Constitution of the Salt River Pima-Maricopa Indian Community for carrying out orders of the community court, maintaining law and order within the community, and protection of the community's safety, health, and welfare.

(b) There is further established the office of chief of police, who shall direct the operation of the department, who shall be directly responsible to the president/vice-president and to the community manager, and who shall be appointed according to the personnel policies of the Salt River Pima-Maricopa Indian Community. The police chief is authorized to delegate to qualified persons within the police department such authority as is necessary to carry out the functions and responsibilities of his office. (Ord. No. SRO-162-93, § 1, 1-27-93)

Sec. 5-82. Powers and duties.

The police chief shall uphold the Constitution of the Salt River Pima-Maricopa Indian Community and applicable laws of the United States. Further, the police chief shall:

(a) Preserve the peace.

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*Editor's note—Sections 1 and 2 of Ord. No. SRO-162-93, adopted Jan. 27, 1993, did not specifically amend this Code; hence, inclusion as Art. VI, §§ 5-81 and 5-82, was at the discretion of the editor.

Cross references—Criminal procedure, §§ 5-31—5-41; obedience to law enforcement officers regulating traffic, § 16-7; duties of police re abandoned vehicles, §§ 16-291—16-296.

ABSENTEE SHAWNEE
TRIBE OF INDIANS
OKLAHOMA

SUBCHAPTER G

EMINENT DOMAIN

Section 893.1. Who May Exercise Authority

The Executive Committee, and any officer or Agency of the Tribe specifically authorized to do so by statute may obtain real or personal property by eminent domain proceedings in conformance with the Tribal Constitution, the Indian Civil Rights Act, and this Subchapter.

Section 893.2. What Property May be Condemned by Eminent Domain

Except property made exempt from eminent domain by the Tribal Constitution and statutes, all property real and personal within the Tribal jurisdiction, not owned by the Tribe and their agencies, shall be subject to eminent domain except title to property held in trust by the United States for an Indians or Tribe, or property held by an Indian or Tribe subject to a restriction against alienation imposed by the United States unless the United States has consented to the eminent domain of said property. Any lease or Tribally granted assignment, or other non-trust right to use such trust or restricted property conveyed by Tribal or federal law shall be subject to eminent domain in conformance with the Tribal Constitution and statutes and the Indian Civil Rights Act.

Section 893.3. Condemnation of Property

(a) **Applicability of Other Rules.** The Rules of Civil Procedure for the Courts of the Tribe govern the procedure for the condemnation or real and personal property under the power of eminent domain, except as otherwise provided in this Subchapter.

(b) **Joinder of Properties.** The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) **Amount to Be Paid.** The owner shall be entitled to receive just compensation for all property or rights to property taken from him in eminent domain proceedings.

description of no other property than that to be taken from the defendants to whom it is directed.

(c) **Service of Notice.**

(1) Personal Service. Personal service of the notice shall be made in accordance with the rules for personal service of summons upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known. A copy of the complaint may, but need not, be served.

(2) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this Section, service of the notice shall be made on that defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this Section but whose place of residence is then known. Unknown owners may be served by publication in a like manner by a notice addressed to "Unknown Owners."

(3) When Publication Service Complete. Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(d) **Return; Amendment.** Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons.

Section 893.6. Appearance or Answer

If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within twenty 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objection not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

Court may also award reasonable actual damages incurred, not to exceed One Thousand Dollars ($1,000.00) in excess of fair rental value of the premises during the period in which the plaintiff held possession or title against the plaintiff notwithstanding the doctrine of sovereign immunity. The Court at any time may drop a defendant unnecessarily or improperly joined.

(d) **Effect.** Except as otherwise provided in the notice, or stipulation of dismissal, or order of the Court, any dismissal is without prejudice.

Section 893.10. Deposit and Its Distribution

The plaintiff shall deposit with the Court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the Court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the Court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the Court shall enter judgment against him and in favor of the plaintiff for the overpayment.

Section 893.11. Costs

Costs shall normally be paid by the Plaintiff in condemnation actions unless the Court, in its discretion determines that a defendant should pay their own costs, which may include a reasonable portion of plaintiff's costs because of inequitable conduct or other statutory reason.

C & A TRIBE OKLAHOMA

SUBCHAPTER G

EMINENT DOMAIN

Section 893.1. Who May Exercise Authority

The Tribal Legislative Body, and any officer or Agency of the Tribes specifically authorized to do so by statute may obtain real or personal property by eminent domain proceedings in conformance with the Tribal Constitution, the Indian Civil Rights Act, and this Subchapter.

Section 893.2. What Property May be Condemned by Eminent Domain

Except property made exempt from eminent domain by the Tribal Constitution and statutes, all property real and personal within the Tribal jurisdiction, not owned by the Tribes and their agencies, shall be subject to eminent domain except title to property held in trust by the United States for an Indians or Tribe, or property held by an Indian or Tribes subject to a restriction against alienation imposed by the United States unless the United States has consented to the eminent domain of said property. Any lease or Tribally granted assignment, or other non-trust right to use such trust or restricted property conveyed by Tribal or federal law shall be subject to eminent domain in conformance with the Tribal Constitution and statutes and the Indian Civil Rights Act.

Section 893.3. Condemnation of Property

(a) **Applicability of Other Rules.** The Rules of Civil Procedure for the Courts of the Tribes govern the procedure for the condemnation or real and personal property under the power of eminent domain, except as otherwise provided in this Subchapter.

(b) **Joinder of Properties.** The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) **Amount to Be Paid.** The owner shall be entitled to receive just compensation for all property or rights to property taken from him in eminent domain proceedings.

Section 893.4. Complaint

(a) **Caption.** The complaint shall contain a caption as provided in Section 110(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(b) **Contents.** The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interest to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in Section 893.5 of this Subchapter upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in Section 893.6 of this Subchapter. The Court meanwhile may order such distribution of a deposit as the facts warrant.

(c) **Filing.** In addition to filing the complaint with the Court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

Section 893.5. Process in Eminent Domain

(a) **Notice; Delivery.** Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons.

(b) **Same; Form.** Each notice shall state the Court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within twenty 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the Court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address where he may be served. The notice need contain a

Section 893.7. Amendment of Pleadings

Without leave of Court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by Section 893.9 of this Subchapter. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Section 231(b) of this Title, upon any party affected thereby who has appeared and, in the manner provided in Section 893.9 of this Subchapter, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the Court for the use of the defendants at least one copy of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by Section 893.6 of this subchapter, a defendant may serve his answer to the amended pleading, in the form and manner and with the same effect as there provided.

Section 893.8. Substitution of Parties

If a defendant dies or becomes incompetent or transfers his interest after his joinder, the Court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in Section 893.5(c).

Section 893.9. Dismissal of Action

(a) **As of Right.** If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in the property or taken possession thereof, the plaintiff may dismiss the action as to that property, without an order of the Court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(b) **By Stipulation.** Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the Court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the Court may vacate any judgment that has been entered.

(c) **By Order of the Court.** At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the Court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, without awarding just compensation of the possession, title or lesser interest so taken, or, if the possession, title, or interest in such property is to be returned to the defendant upon dismissal by motion of the plaintiff, the

SISSETON-WAHPETON

SISSETON-WAHPETON SIOUX TRIBE

CHAPTER 47

CONDEMNATION OF TRUST OR RESTRICTED LAND UNDER POWER OF EMINENT DOMAIN

S.W.S.T. CODE
☐ Amendment
☒ New Adoption
Judicial Approved 12-5-84
Council Adopted 12-5-84

47-01-01 SCOPE OR POWER OF EMINENT DOMAIN
The Sisseton-Wahpeton Sioux Tribe shall have authority pursuant to this Chapter and in accordance with Section 8 of the Act of October 19, 1984, 98 Stat, 2411 (P.L. 98-513), to condemn trust or restricted land within the original exterior boundaries of the Lake Traverse Reservation, as described in Article III of the Treaty of February 19, 1867, 15 Stat. 505, for public uses, including the elimination of fractional heirship interests in such land, the consolidation of tribal interests in land and the development of tribal agriculture.

47-02-01 PETITIO FOR ASCERTAINMENT OF COMPENSATION BY JURY
In all cases where the Sisseton-Wahpeton Sioux Tribe shall determine to condemn trust or restricted land, it shall file a petition in the Tribal Court praying that the just compensation to be made for such property may be ascertained by a jury.

47-03-01 CONTENTS OF PETITION FOR ASCERTAINMENT OF COMPENSATION
A petition filed pursuant to Section 47-02-01 shall name the Sisseton-Wahpeton Sioux Tribe as plaintiff, and all persons having interest in or liens upon the property affected by the proceedings as defendants, so far as they shall be known at the time of filing the same. It shall contain a description of the property to be taken or damaged shall be clearly set forth in the petition. It shall not be necessary to specify the interests or claims of the several defendants in the land or property affected by the proceedings.

47-04-01 AMENDMENT OF PETITION AND NOTICE
If any person is a proper party defendant to a proceedings under this Chapter, or any property affected thereby, shall have been omitted from said petition or notice, the plaintiff may file amendments to the same, which amendments from the filing thereof shall have the same effect as though contained in said petition and notice.

47-11-01 SUMMONS TO DEFENDANTS - CONTENTS

At any time after the filing of the petition, the plaintiff may issue a summons to the defendants, which shall be entitled in the action or proceeding, and state the time and place of filing the petition, the nature of the proceeding, and contain a notice to the effect that if the defendants do not appear in said proceeding within thirty days from the service thereof, exclusive of the day of service, the plaintiff will apply to the court for an order to impanel a jury and ascertain the just compensation for the property proposed to be taken or damaged in such proceeding. The summons may be served as in civil actions unless otherwise provided in this Chapter.

47-12-01 PUBLICATION OF SUMMONS TO UNKNOWN OR NONRESIDENT OWNERS - PERSONAL SERVICE OUTSIDE RESERVATION

If there are unknown owners or persons interested in the property to be taken or damaged, or if any of the defendants are not residents of the Lake Traverse Indian Reservation, the plaintiff may apply to the court upon affidavit setting forth the nature of the proceeding, and the facts in relation to such unknown persons or nonresident defendants, for an order of publication of such summons, whereupon the court shall grant such order. The summons as published shall have annexed thereto a notice that if the defendants as to whom publication has been ordered do not appear in said proceeding within thirty days from the first publication thereof, the plaintiff will make application to the court for the order mentioned in the body of the summons. Such summons shall be published for thirty days at least once in each week in some newspaper published and of general circulation within the Lake Traverse Indian Reservation, and each publication of the same shall show at the top thereof the date of the first publication. Personal service on any defendant outside of the Lake Traverse Indian Reservation shall be of the same effect as service within the Reservation and shall dispense with necessity of publication as to such defendant.

47-13-01 NOTICE OF PROCEEDING TO UNITED STATES - CONTENTS

Within ten days after the filing of the petition, the plaintiff shall serve upon the Superintendent of the Sisseton Agency of the United States Bureau of Indian Affairs and upon the United States Attorney for the district within which the land to be condemned is situated a notice of the pendency of the condemnation proceedings, which shall be entitled in the action or proceeding, and state the time and place of filing the petition, the nature of the proceeding, and the right of the United States to intervene in such proceeding. In all cases, the notice shall have attached to it a copy of the petition and a copy of the Tribal Council Resolution required by section 47-06-01 of this Chapter. Unless within thirty days from the service of the notice the United States enters an appearance in the proceeding, the parties shall not be required to make service upon the United States of papers filed in the proceeding.

any lis pendens involving the title of property of such defendant shall be discharged and no other proceeding for the same purpose shall be brought by the plaintiff against such defendant until after the expiration of one year, and then only upon the condition that the plaintiff will, in good faith prosecute such proceeding against such defendant with reasonable diligence.

47-18-01 JURY COMPOSITION - VERDICT - DISAGREEMENT

Proceedings under this Chapter shall be held before a jury composed of six jurors and one alternate. A verdict may be rendered by not less than five-sixths of the jurors constituting a jury. Where five-sixths of the jurors constituting a jury cannot agree after being kept together for as long as is deemed reasonable by the Court, the Court shall discharge the jury and direct a new trial before another jury.

47-19-01 CONTINUANCE OF PROCEEDINGS AS TO DEFENDANTS NOT SERVED

As to all defendants not served before the trial said proceedings shall be continued as the court may direct, for the purpose of serving the summons on such defendants.

47-20-01 ISSUE TRIED BY JURY

The only issue that shall be tried by the jury upon the petition shall be the amount of compensation to be paid for the property taken or damaged.

47-21-01 VIEW OF PREMISES BY JURY

Upon the demand of any party to the proceeding, if the court deem it necessary, the jury may view the premises under such rules as the court may prescribe for such viewing.

47-22-01 COMPENSATION DETERMINED FOR EACH PARCEL OR FRACTIONAL INTEREST

If the compensation for all the property taken or damaged in ascertained by the jury upon one trial, they shall ascertain and return in their verdict the compensation to be paid for each distinct lot or parcel of land or property taken or damaged or for each fractional interest in any allotment or part thereof taken or damaged. Upon request, the court may provide the jury with technical assistance in computing the compensation determined.

47-23-01 RECORDING OR VERDICT - JUDGEMENT ON VERDICT

Upon the return of the verdict, the court shall order the same to be recorded, and shall enter such judgement thereon as the nature of the case may require, and that the plaintiff pay to the persons entitled thereto the amount of compensation ascertained by the verdict.

47-26-01 SEVERABILITY

T: CODE
☐ Amendment
☑ New Adoption
Judicial Approved
2-24-88
Council Adopted
3-01-88

If any clause, sentence, paragraph, section, or part of this code shall, for any reason be adjudicated by any Court of competent jurisdiction, to be invalid or unconstitutional, such judgement shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which the judgement shall have been rendered.

EASTERN BAND OF CHEROKEE INDIANS

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Current through October 2005, Supplement No. 5

Chapter 40 - Eminent Domain*

***Cross references:** Real property, ch. 47; roads and highways, ch. 136A.

Sec. 40-1. Condemnation of land for public purpose.

The Tribe shall have the power to condemn land within the Cherokee Indian Reservation whenever such land is deemed by the Tribal Council to be necessary for a public purpose. The exercise of eminent domain shall be initiated by the Tribal Council passing a resolution identifying the land to be taken for a public purpose, the possessory holder and leasehold tenants and the purpose for which the land will be used.

Sec. 40-2. Compensation of land holder.

The possessory holder or leasehold tenant shall be compensated for such condemnation by payment of the value of the improvements or betterments placed on the land.

Sec. 40-3. Determination of land value.

If the possessory holder or leasehold tenant does not agree with the Tribe on the value of the improvements or betterments, the Tribe shall file suit in the Cherokee Court and deposit with the Clerk a sum equal to the Tribe's appraised value of the improvements or betterments. The actual value shall be determined by a jury of six Tribal members.

Sec. 40-4. Construction while suit is pending.

The Tribe may proceed with construction of the public purpose while the suit is pending but not without having first obtained the agreement of the possessory holder or leasehold tenant or having filed suit and deposited an amount equal to the appraised value of improvements or betterments.

(Charter, § 24; Ord. No. 19, 11-7-1991

EXHIBIT E

Fair Market Value as the Accepted Compensation Standard for Indian Lands

Congress and the Federal courts have adopted fair market value as the appropriate standard of compensation for Indian lands. The major vehicle by which Indian tribes were compensated for the Federal government's use or taking of their lands was the Indian Claims Commission Act ("ICCA"). Under the ICCA, compensation was based on the fair market value of all lands taken. Prior to that Act, Congress dealt with Indian land compensation claims piecemeal, through special statutes such as the Pueblo Lands Act of 1924[1] or through private laws waiving Federal sovereign immunity to allow a tribe to sue the U.S. for damages with respect to specific claims. Fair market value was also the standard of compensation under these laws.

I. INDIAN CLAIMS COMMISSION ACT

The Indian Claims Commission Act is the major vehicle by which tribes have received compensation for the Federal government's use or taking of their lands. Under the Act, the Indian Claims Commission and the United States courts decided on fair market value as the appropriate standard of compensation.

A. Background and Description of the Indian Claims Commission Act

Historically, federal entities used, took, or transferred ownership of Indian lands from time to time without engaging in formal condemnation or paying compensation, or were otherwise responsible for Indian land losses. Under the doctrine of sovereign immunity, however, Indian tribes had no recourse against the federal government.

To provide a forum to address these wrongs, in 1946, Congress passed the Indian Claims Commission Act.[2] The ICCA created the Indian Claims Commission to hear Indian claims against the federal government.[3] The Commission was empowered to hear and decide five different classes of claims accruing before the passage of the Act:

> (1) claims in law and equity arising under the Constitution, laws, treaties of the United States, and Executive Orders of the President;

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[1] Pub. L. No 63-258, 43 Stat. 636.

[2] Pub. L. No. 79-726, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. §§ 70 – 70v-3 (1976 and Supp. V 1981)).

[3] *Id.* at § 1.

(2) all other claims in law and equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States, if the United States was subject to suit;

(3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;

(4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant;

(5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.[4]

Indian tribes could seek compensation for land claims under several of these classes. Under the Act, appeal from Commission decisions could be had to the Court of Claims.[5]

The Commission's authority expired on September 20, 1978.[6] Section 24 of the ICCA continued as good law. Sometimes known as the Indian Tucker Act, it gave the Court of Claims continuing jurisdiction over one class of claims:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.[7]

Neither the Act as a whole nor the Indian Tucker Act specified any standard for compensating tribal land claims. Fair market value became that standard.

B. Fair Market Value as the Standard for Compensation Under the Indian Claims Commission Act

Though the Act did not specify, the Commission and the Court of Claims quickly settled on fair market value as the standard for compensating tribal land claims.

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[4] *Id.* at § 2.

[5] *Id.* at § 20 (b).

[6] 25 U.S.C. § 70v-3 (1981 Supp. V).

[7] 28 U.S.C. § 1505.

In an early representative case, for example, the Court of Claims held that the standard of compensation under the Act for lost land was "fair market value," defined as the "highest price estimated in terms of money which land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is best adapted and for which it is capable of being used."[8] Where possible, the actual fair market value would be used. Otherwise, an "estimate or imputed fair market value" would be used.[9] The Commission also adopted fair market value as the proper standard.[10] Consequently, the Court of Claims routinely upheld Commission valuation decisions that were based on a reasonable conclusion as to the fair market value. In *Miami Tribe of Oklahoma v. United States*,[11] for example, the Court of Claims adopted the Indian Claims Commission conclusion that the "value" of lands the Miami had ceded to the government was the "fair market value" on the date of cession, determined by looking to comparable land sales in the region.

Although the Act recognized five different classes of claims, fair market value was the standard applied to land losses under all classes. As explained in *Three Affiliated Tribes of Ft. Berthold Reservation v. United States*, the significant difference between classes of land loss claims was the availability of interest; but fair market value was the standard regardless.[12] Further, tribes were allowed to seek fair market value not just for expropriated lands but for past land purchases where the government had set a price less than the fair market value. In *Upper Chehalis Tribe v. United States*, the court explained that in "a case where land held by Indian title is appropriated by the United States under an unratified treaty, and the Indians were paid a sum less than the market value of the land," they were allowed to recover the difference.[13]

The few challenges to the use of fair market value were rejected. In *Otoe & Missouria Tribe v. United States*, a case concerning an 1833 Indian land cession, the court recognized that discovering the fair market value of land at the remove of more than 100 years could be hard, especially when the land was in an area remote from actual markets of the time.[14] But the court rejected the government's alternative of merely valuing the land according to the Indians' use of it.[15] Similarly, in *Tlingit & Haida Indians v. United States*, the court specifically rejected

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[8] *Miami Tribe of Oklahoma v. United States*, 146 Ct. Cl. 421, 450, 175 F. Supp. 926, 943 (1959).

[9] *Id.*

[10] *See, e.g., Tillamook Tribes of Indians v. United States,* 4 Ind. Cl. Comm. 57, 58-60 (1955) (exploring at length the use of the fair market value standard).

[11] 150 Ct. Cl. 725, 731-36 (Ct. Cl. 1960), *overruled on other grounds, Pawnee Indian Tribe v. United States*, 157 Ct. Cl. 134, 138 (Ct. Cl. 1962).

[12] 182 Ct. Cl. 543, 551 (Ct. Cl. 1968).

[13] 155 F. Supp. 226, 230 (Ct. Cl. 1957. *See also Crow Tribe of Indians v. United States*, 151 Ct. Cl. 281, 284. (Ct. Cl. 1960).

[14] 131 F. Supp. 265, 290 (Ct. Cl. 1955).

[15] *Id.*

arguments from the United States that it should use "value to the Indians" instead of fair market value to determine the value of lands.[16]

But these challenges were few. Most of the disputes involving fair market value were only over how to best determine it. In *Pillager Bands of Chippewa Indians v. United States*, the Court of Claims had to decide whether the Indians should be paid the "fair market value" of their lost lands as of 1848, when they were ceded by treaty, or their "fair market value" in 1911, when the Executive removed their status as Indian lands.[17] The use of fair market value was not in doubt. In *Yankton Sioux Tribe v. United States*, there was also no dispute that the government had to pay the Yankton Sioux the fair market value of lands purchased by the government at unfairly low prices (less the price actually paid).[18] The only dispute was whether to give the land the value it would have had if sold in parcels to a number of purchasers or to value it as if sold en masse.[19] Similarly, in a dispute between Pima and Maricopa Indians along the Gila River and the federal government, over lands taken from the former by the latter, all agreed that fair market value was the right standard of compensation.[20] The only disagreement was whether to find the fair market value by positing "an ideal buyer operating in a perfect market,"[21] or by finding the "highest and best potential uses . . . which are possible and probable in the context of land as it stands on the taking date and knowledge then available" with the objective of finding a "realistic market price."[22]

The Commission and the courts adopted different methods for determining the fair market value in the often unusual circumstances obtaining on Indian lands. In *Red Lake v. United States,* the Court of Claims reviewed these methods, in the context of a Commission decision awarding various Chippewa bands the difference between the $ 0.45 per acre that was the fair market value of the Chippewa cession of millions of acres and the $ 0.08 per acre that the federal government had paid. [23] The court explained that "the test of valuation is fair market value used in the sense of what it fairly may be believed that a purchaser in fair market conditions would have given for it."[24] The court acknowledged that no actual market existed for Chippewa lands at the time of the cession because of their remoteness and the size of the cession. But the fair market value could be discovered in other ways. Citing *Otoe and Missouria Tribe of Indians*, the court pointed out that "[a]bsent evidence of actual market conditions," the market

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[16] 82 Ct. Cl. 130, 136 (Ct. Cl. 1968).

[17] 192 Ct. Cl. 698, 703 (Ct. Cl. 1970).

[18] 224 Ct. Cl. 62, 93-98 (Ct. Cl. 1980).

[19] *Id.*

[20] *Gila River Pima-Maricopa Indian Community v. United States*, 2 Cl. Ct. 12, 14 (Ct. Cl. 1982), *aff'd in part without opinion and vacated in part without opinion by,* 738 F.2d 452, 1984 U.S. App. LEXIS 15082 (Fed. Cir. 1984).

[21] *Id.* at 27.

[22] *Id.* at 28.

[23] 164 Ct. Cl. 389, 394 (Ct. Cl. 1964).

[24] *Id.* (citation and marks of quotation omitted).

value could still be estimated.[25] In *Otoe & Missouria Tribe v. United States*, the court had approved a "method of valuation" that took "into consideration whatever sales of neighboring lands are of record[;] . . . the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value, water power, its then or potential use, [and] markets and transportation -- considering the ready markets at that time and the potential market."[26] *Otoe and Missouria* did not specifically state that this alternate method was meant to estimate fair market value, but *Red Lake* and other cases properly took it as such. Though these methods all differed in some particulars, they were all attempts to discover the fair market value of the land interest.

Though most cases under the Act dealt with outright transfers of large tracts of land, some dealt with partial interests such as easements and rights of way or with timber rights or mineral rights. Fair market value was the standard applied to all these cases. In one case, the Court of Claims had to decide on the proper compensation for a right-of-way across Indian land that the federal government had acquired.[27] The court used fair market value.[28] In another case, in a claim for government taking of Indian land to build a highway, the court concluded that the fair market value of the land used for the highway was the proper compensation.[29]

The cases and Commission decisions cited to this point are by no means outliers. I have compiled a lengthy but by no means comprehensive list of the Court of Claims cases and Commission decisions that used fair market value to determine compensation for lost land interests.[30]

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[25] *Id.*

[26] 131 F. Supp. 265, 290 (Ct. Cl. 1955).

[27] *Coast Indian Community v. United States*, 213 Ct. Cl. 129 (Ct. Cl. 1977).

[28] *Id.* at 141-48.

[29] *Menominee Tribe of Indians*, 1981 U.S. Ct. Cl. LEXIS 1328 at *17 (Ct. Cl. 1981), *cited in, Menominee Indian Tribe v. United States*, 39 Fed. Cl. 441, 446 (Ct. Cl. 1997).

[30] *Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 221 (Ct. Cl. 1986), *Northern Paiute Nation v. United States*, 225 Ct. Cl. 275, 297 (Ct. Cl. 1980), *Creek Nation*, 216 Ct. Cl. 455, 457 (Ct. Cl. 1978), *Prairie Band of Pottawatomie Tribe of Indians v. United States*, 215 Ct. Cl. 1 (Ct. Cl. 1977), *United States v. Ft. Sill Apache Tribe*, 202 Ct. Cl. 134 (Ct. Cl. 1973), *United States v. Cherokee Nation*, 200 Ct. Cl. 583 (Ct. Cl. 1973), *United States v. Creek Nation*, 201 Ct. Cl. 386, (Ct. Cl. 1973), *United States v. Pueblo de Zia*, 200 Ct. Cl. 601 (Ct. Cl. 1973), *Confederated Tribes of the Warm Springs Reservation of Oregon v. United States,* 29 Ind. Cl. Comm. 324 (1972), *Gila River Pima-Maricopa Indian Community v. United States*, 199 Ct. Cl. 586 (Ct. Cl. 1972), *United States v. Nez Perce Tribe of Indians*, 194 Ct. Cl. 490 (Ct. Cl. 1971), *Three Affiliated Tribes of Ft. Berthold Reservation v. United States*, 25 Ind. Cl. Comm. 179, 214 (1971), *Klamath & Modoc Tribes v. United States*, 193 Ct. Cl. 670 (Ct. Cl. 1971), *Confederated Salish & Kootenai Tribes of Flathead Reservation v. United States*, 193 Ct. Cl. 801 (Ct. Cl. 1971), *Mohave Indians v. United States,* 23 Ind. Cl. Comm. 87, 92 (1970), *United States v. Northern Paiute Nation*, 183 Ct. Cl. 321 (Ct. Cl. 1968), *Citizen Band of Potawatomi Indians v.*

II. PUEBLO LANDS ACT OF 1924

In 1924 Congress passed the Pueblo Lands Act[31] to resolve a difficult situation of good faith encroachments by New Mexican Hispanics and Anglos on Pueblo land. The Pueblo Lands Act and the sparse case law available under it use fair market value to determine the compensation owed both to the Pueblos and to good-faith settlers for land losses. The Pueblo Lands Act and the case law do not make a distinction between the valuation of Indian losses and of losses experience by non-Indians.

The Pueblo Lands Act appointed a board to determine the ownership of Pueblo lands in New Mexico.[32] Under certain circumstances, the board instructed to determine that title to certain Pueblo lands had passed into non-Pueblo hands (e.g., in cases of adverse possession).[33] In such cases, Congress directed the board to determine whether the United States could recover or could have recovered the property by a timely lawsuit, and, if so, to determine "the fair market value of said . . . tract or tracts of land ... and the amount of loss, if any, suffered by said Indians . . . ."[34] The Act then stated that "[t]he United States shall be liable, and the board shall award compensation . . . to the extent of any loss suffered by said Indians. . . ."[35] Conversely, the board was instructed to report on "the fair market value of lands, improvements appurtenant thereto, and water rights" of good faith non-Indian claimants who were to be denied their claims, along with a statement of the losses suffered by them.[36] It is evident from the language of the Act that

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United States, 179 Ct. Cl. 473 (Ct. Cl. 1967), *United States v. Creek Nation*, 18 Ind. Cl. Comm. 434 (1967), *Lummi Tribe of Indians v. United States*, 181 Ct. Cl. 753 (Ct. Cl. 1967), *Sac & Fox Tribe of Indians v. United States*, 179 Ct. Cl. 8 (Ct. Cl. 1967), *United States v. Emigrant New York Indians*, 177 Ct. Cl. 263 (1966), *Nez Perce Tribe of Indians v. United States*, 176 Ct. Cl. 815 (Ct. Cl. 1966), *Sac & Fox Tribe of Indians v. United States*, 167 Ct. Cl. 710 (Ct. Cl. 1964), *Red Lake v. United States*, 164 Ct. Cl. 389 (Ct. Cl. 1964), *Crow Tribe of Indians v. United States*, 151 Ct. Cl. 281 (Ct. Cl. 1960), *Pawnee Indian Tribe of Okla. v. United States*, 8 Ind. Cl. Comm. 648, 719-734 (1960), *Mohave Tribe v. United States*, 7 Indian Cl. Comm'n 219 (1959), *Absentee Shawnee Tribe v. United States*, 6 Ind. Cl. Comm. 377, 394 (1958), *Uintah & White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1 (Ct. Cl. 1957), *Snake or Paiute Indians v. United States*, 4 Indian Claims Commission 608, 627 (1956), *Osage Nation of Indians v. United States*, 119 Ct. Cl. 592 (Ct. Cl. 1951), *Alcea Band of Tillamooks. v. United States*, 115 Ct. Cl. 463, 87 F. Supp. 938 (1950), *rev'd as to award of interest*, 341 U.S. 48 (1951).

[31] Pub. L. No 63-258, 43 Stat. 636.

[32] *Id.* at § 2.

[33] *Id.* at § 2, 4.

[34] *Id.* at § 6.

[35] *Id.* at § 6(c).

[36] *Id.* at § 7.

Congress intended compensation to be based on fair market value.[37] Fair market value was the starting point in determining loss, for both Pueblos and non-Indians.

In the Indian Pueblos of New Mexico Act of 1933,[38] Congress appropriated sums to make good on the payments called for in the Pueblo Lands Act and explicitly tied the quantity appropriated to the fair market value of the lands involved.[39] For example, Congress appropriated a sum to compensate the non-Indian claimants equal to the "fair market value of [their] lands, improvements appurtenant thereto, and water rights" and instructed the Secretary of the Interior to report if the sums Congress had allocated differed from the fair market value of the lands claimed.

Notably, the Pueblo Lands Act of 1924 did not make a distinction between the measure of compensation owed to the Pueblos and the measure for non-Indian claimants. Neither did one of the few cases to concern the Act, *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, which described both the Pueblos and non-Indian claimants as alike receiving the "value" of their lost property rights.[40]

In the Pueblo Lands Act of 1924 and its 1933 Amendment, Congress recognized that fair market value was the appropriate standard of compensation for Indians and non-Indians alike.

III. PRIVATE LAWS WAIVING FEDERAL SOVEREIGN IMMUNITY

Before the Indian Claims Commission Act, and with the exception of the rare regional solution like the Pueblo Lands Act, Congress generally resolved Indian land loss claims with piecemeal private laws waiving Federal sovereign immunity for the purposes of individual claims. Under these private laws, the courts also appear to have used fair market value as the standard for compensation.

In two different cases, the Supreme Court found that tribes should be given "just compensation" for lost lands, just compensation then being the fair market value of the lands. In one case, the Court found that "the United States has taken and holds possession of the entire Quarry tract . . . ; and since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain."[41]. In another, the Court found that "the [tribal] lands were appropriated by the United States in circumstances which

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[37] *See also* Richard W. Hughes, *Indian Law*, 18 N.M. L. REV. 403, 438 at n. 57 (1988) ("The Pueblos were to receive fair market value for the land they lost.").

[38] Pub. L. No. 73-28, 48 Stat. 108.

[39] *Id.* at § 3.

[40] 472 U.S. 237, 245 (1985).

[41] *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 359 (1926).

involved an implied undertaking by it to make just compensation to the tribe."[42] Just compensation was then, as now, the fair market value of the land.[43]

Other cases awarded tribes the "value" of their land.[44] This also appears to have been understood as "just compensation" or, therefore, fair market value.[45] Another case awarded the plaintiff tribe the "acquisition costs" of the land in question,[46] which also seems to equate to fair market value.

These older cases also appear to have compensated tribal land losses according to their fair market value.

IV. CONCLUSION

Under the Indian Claims Commission Act and other laws, fair market value has been the accepted standard of compensation by both Congress and the courts. Where the opportunity has presented itself, Congress has rejected compensating Indian land losses under a different standard than non-Indian land losses.

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[42] *United States v. Creek Nation*, 295 U.S. 103, 111 (1935).

[43] *See Olson v. United States*, 292 U.S. 246, 255 (1934) ("Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined."), *Davis v. Newton Coal Co.*, 267 U.S. 292, 301 (1925) (asserting that the "market price prevailing at the time and place of the taking" is "just compensation"), *McCoy v. Union E. R. Co.*, 247 U.S. 354, 365 (1918) ("the owner shall not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation").

[44] *See Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 496 (1937), *Shoshone Tribe of Indians of Wind River Reservation v. United States*, 85 Ct. Cl. 331 (Ct. Cl. 1937), *Nez Perce Tribe of Indians v. United States*, 95 Ct. Cl. 1, 11 (Ct. Cl. 1941).

[45] *See generally, New York v. Sage*, 239 U.S. 57 (1915).

[46] *Menominee Tribe of Indians v. United States*, 95 Ct. Cl. 232, 243 (Ct. Cl. 1941).

EXHIBIT F

Circular A-4
September 17, 2003

Circular A-4

September 17, 2003

TO THE HEADS OF EXECUTIVE AGENCIES AND ESTABLISHMENTS

Subject: Regulatory Analysis

This Circular provides the Office of Management and Budget's (OMB's) guidance to Federal agencies on the development of regulatory analysis as required under Section 6(a)(3)(c) of Executive Order12866, "Regulatory Planning and Review," the Regulatory Right-to-Know Act, and a variety of related authorities. The Circular also provides guidance to agencies on the regulatory accounting statements that are required under the Regulatory Right-to-Know Act.

This Circular refines OMB's "best practices" document of 1996 (http://www.whitehouse.gov/omb/inforeg/riaguide.html), which was issued as a guidance in 2000 (http://www.whitehouse.gov/omb/memoranda/m00-08.pdf), and reaffirmed in 2001 (http://www.whitehouse.gov/omb/memoranda/m01-23.html). It replaces both the 1996 "best practices" and the 2000 guidance.

In developing this Circular, OMB first developed a draft that was subject to public comment, interagency review, and peer review. Peer reviewers included Cass Sunstein, University of Chicago; Lester Lave, Carnegie Mellon University; Milton C. Weinstein and James K. Hammitt of the Harvard School of Public Health; Kerry Smith, North Carolina State University; Jonathan Weiner, Duke University Law School; Douglas K. Owens, Stanford University; and W. Kip Viscusi, Harvard Law School. Although these individuals submitted comments, OMB is solely responsible for the final content of this Circular.

A. Introduction

This Circular is designed to assist analysts in the regulatory agencies by defining good regulatory analysis – called either "regulatory analysis" or "analysis" for brevity – and standardizing the way benefits and costs of Federal regulatory actions are measured and reported. Executive Order 12866 requires agencies to conduct a regulatory analysis for economically significant regulatory actions as defined by Section 3(f)(1). This requirement applies to rulemakings that rescind or modify existing rules as well as to rulemakings that establish new requirements.

The Need for Analysis of Proposed Regulatory Actions[1]

Regulatory analysis is a tool regulatory agencies use to anticipate and evaluate the likely consequences of rules. It provides a formal way of organizing the evidence on the key effects –

[1] We use the term "proposed" to refer to any regulatory actions under consideration regardless of the stage of the regulatory process.

good and bad – of the various alternatives that should be considered in developing regulations. The motivation is to (1) learn if the benefits of an action are likely to justify the costs or (2) discover which of various possible alternatives would be the most cost-effective.

A good regulatory analysis is designed to inform the public and other parts of the Government (as well as the agency conducting the analysis) of the effects of alternative actions. Regulatory analysis sometimes will show that a proposed action is misguided, but it can also demonstrate that well-conceived actions are reasonable and justified.

Benefit-cost analysis is a primary tool used for regulatory analysis.[2] Where all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the most efficient alternative, that is, the alternative that generates the largest net benefits to society (ignoring distributional effects). This is useful information for decision makers and the public to receive, even when economic efficiency is not the only or the overriding public policy objective.

It will not always be possible to express in monetary units all of the important benefits and costs. When it is not, the most efficient alternative will not necessarily be the one with the largest quantified and monetized net-benefit estimate. In such cases, you should exercise professional judgment in determining how important the non-quantified benefits or costs may be in the context of the overall analysis. If the non-quantified benefits and costs are likely to be important, you should carry out a "threshold" analysis to evaluate their significance. Threshold or "break-even" analysis answers the question, "How small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?" In addition to threshold analysis you should indicate, where possible, which non-quantified effects are most important and why.

Key Elements of a Regulatory Analysis

A good regulatory analysis should include the following three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.

To evaluate properly the benefits and costs of regulations and their alternatives, you will need to do the following:

- Explain how the actions required by the rule are linked to the expected benefits. For example, indicate how additional safety equipment will reduce safety risks. A similar analysis should be done for each of the alternatives.
- Identify a baseline. Benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a "no action" baseline: what the world will be like if the proposed rule is not adopted. Comparisons to a "next best" alternative are also especially useful.

[2] See Mishan EJ (1994), *Cost-Benefit Analysis*, fourth edition, Routledge, New York.

- Identify the expected undesirable side-effects and ancillary benefits of the proposed regulatory action and the alternatives. These should be added to the direct benefits and costs as appropriate.

With this information, you should be able to assess quantitatively the benefits and costs of the proposed rule and its alternatives. A complete regulatory analysis includes a discussion of non-quantified as well as quantified benefits and costs. A non-quantified outcome is a benefit or cost that has not been quantified or monetized in the analysis. When there are important non-monetary values at stake, you should also identify them in your analysis so policymakers can compare them with the monetary benefits and costs. When your analysis is complete, you should present a summary of the benefit and cost estimates for each alternative, including the qualitative and non-monetized factors affected by the rule, so that readers can evaluate them.

As you design, execute, and write your regulatory analysis, you should seek out the opinions of those who will be affected by the regulation as well as the views of those individuals and organizations who may not be affected but have special knowledge or insight into the regulatory issues. Consultation can be useful in ensuring that your analysis addresses all of the relevant issues and that you have access to all pertinent data. Early consultation can be especially helpful. You should not limit consultation to the final stages of your analytical efforts.

You will find that you cannot conduct a good regulatory analysis according to a formula. Conducting high-quality analysis requires competent professional judgment. Different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions.

A good analysis is transparent. It should be possible for a qualified third party reading the report to see clearly how you arrived at your estimates and conclusions. For transparency's sake, you should state in your report what assumptions were used, such as the time horizon for the analysis and the discount rates applied to future benefits and costs. It is usually necessary to provide a sensitivity analysis to reveal whether, and to what extent, the results of the analysis are sensitive to plausible changes in the main assumptions and numeric inputs.

A good analysis provides specific references to all sources of data, appendices with documentation of models (where necessary), and the results of formal sensitivity and other uncertainty analyses. Your analysis should also have an executive summary, including a standardized accounting statement.

B. The Need for Federal Regulatory Action

Before recommending Federal regulatory action, an agency must demonstrate that the proposed action is necessary. If the regulatory intervention results from a statutory or judicial directive, you should describe the specific authority for your action, the extent of discretion available to you, and the regulatory instruments you might use. Executive Order 12866 states that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling need, such as material

failures of private markets to protect or improve the health and safety of the public, the environment, or the well being of the American people ... ."

Executive Order 12866 also states that "Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem." Thus, you should try to explain whether the action is intended to address a significant market failure or to meet some other compelling public need such as improving governmental processes or promoting intangible values such as distributional fairness or privacy. If the regulation is designed to correct a significant market failure, you should describe the failure both qualitatively and (where feasible) quantitatively. You should show that a government intervention is likely to do more good than harm. For other interventions, you should also provide a demonstration of compelling social purpose and the likelihood of effective action. Although intangible rationales do not need to be quantified, the analysis should present and evaluate the strengths and limitations of the relevant arguments for these intangible values.

Market Failure or Other Social Purpose

The major types of market failure include: externality, market power, and inadequate or asymmetric information. Correcting market failures is a reason for regulation, but it is not the only reason. Other possible justifications include improving the functioning of government, removing distributional unfairness, or promoting privacy and personal freedom.

1. Externality, common property resource and public good

An externality occurs when one party's actions impose uncompensated benefits or costs on another party. Environmental problems are a classic case of externality. For example, the smoke from a factory may adversely affect the health of local residents while soiling the property in nearby neighborhoods. If bargaining were costless and all property rights were well defined, people would eliminate externalities through bargaining without the need for government regulation.[3] From this perspective, externalities arise from high transactions costs and/or poorly defined property rights that prevent people from reaching efficient outcomes through market transactions.

Resources that may become congested or overused, such as fisheries or the broadcast spectrum, represent common property resources. "Public goods," such as defense or basic scientific research, are goods where provision of the good to some individuals cannot occur without providing the same level of benefits free of charge to other individuals.

2. Market Power

Firms exercise market power when they reduce output below what would be offered in a competitive industry in order to obtain higher prices. They may exercise market power collectively or unilaterally. Government action can be a source of market power, such as when regulatory actions exclude low-cost imports. Generally, regulations that increase market power

[3] See Coase RH (1960), *Journal of Law and Economics*, 3, 1-44.

for selected entities should be avoided. However, there are some circumstances in which government may choose to validate a monopoly. If a market can be served at lowest cost only when production is limited to a single producer - local gas and electricity distribution services, for example - a natural monopoly is said to exist. In such cases, the government may choose to approve the monopoly and to regulate its prices and/or production decisions. Nevertheless, you should keep in mind that technological advances often affect economies of scale. This can, in turn, transform what was once considered a natural monopoly into a market where competition can flourish.

3. Inadequate or Asymmetric Information

Market failures may also result from inadequate or asymmetric information. Because information, like other goods, is costly to produce and disseminate, your evaluation will need to do more than demonstrate the possible existence of incomplete or asymmetric information. Even though the market may supply less than the full amount of information, the amount it does supply may be reasonably adequate and therefore not require government regulation. Sellers have an incentive to provide information through advertising that can increase sales by highlighting distinctive characteristics of their products. Buyers may also obtain reasonably adequate information about product characteristics through other channels, such as a seller offering a warranty or a third party providing information.

Even when adequate information is available, people can make mistakes by processing it poorly. Poor information-processing often occurs in cases of low probability, high-consequence events, but it is not limited to such situations. For instance, people sometimes rely on mental rules-of-thumb that produce errors. If they have a clear mental image of an incident which makes it cognitively "available," they might overstate the probability that it will occur. Individuals sometimes process information in a biased manner, by being too optimistic or pessimistic, without taking sufficient account of the fact that the outcome is exceedingly unlikely to occur. When mistakes in information processing occur, markets may overreact. When it is time-consuming or costly for consumers to evaluate complex information about products or services (e.g., medical therapies), they may expect government to ensure that minimum quality standards are met. However, the mere possibility of poor information processing is not enough to justify regulation. If you think there is a problem of information processing that needs to be addressed, it should be carefully documented.

4. Other Social Purposes

There are justifications for regulations in addition to correcting market failures. A regulation may be appropriate when you have a clearly identified measure that can make government operate more efficiently. In addition, Congress establishes some regulatory programs to redistribute resources to select groups. Such regulations should be examined to ensure that they are both effective and cost-effective. Congress also authorizes some regulations to prohibit discrimination that conflicts with generally accepted norms within our society. Rulemaking may also be appropriate to protect privacy, permit more personal freedom or promote other democratic aspirations.

Showing That Regulation at the Federal Level Is the Best Way to Solve the Problem

Even where a market failure clearly exists, you should consider other means of dealing with the failure before turning to Federal regulation. Alternatives to Federal regulation include antitrust enforcement, consumer-initiated litigation in the product liability system, or administrative compensation systems.

In assessing whether Federal regulation is the best solution, you should also consider the possibility of regulation at the State or local level. In some cases, the nature of the market failure may itself suggest the most appropriate governmental level of regulation. For example, problems that spill across State lines (such as acid rain whose precursors are transported widely in the atmosphere) are probably best addressed by Federal regulation. More localized problems, including those that are common to many areas, may be more efficiently addressed locally.

The advantages of leaving regulatory issues to State and local authorities can be substantial. If public values and preferences differ by region, those differences can be reflected in varying State and local regulatory policies. Moreover, States and localities can serve as a testing ground for experimentation with alternative regulatory policies. One State can learn from another's experience while local jurisdictions may compete with each other to establish the best regulatory policies. You should examine the proper extent of State and local discretion in your rulemaking context.

A diversity of rules may generate gains for the public as governmental units compete with each other to serve the public, but duplicative regulations can also be costly. Where Federal regulation is clearly appropriate to address interstate commerce issues, you should try to examine whether it would be more efficient to retain or reduce State and local regulation. The local benefits of State regulation may not justify the national costs of a fragmented regulatory system. For example, the increased compliance costs for firms to meet different State and local regulations may exceed any advantages associated with the diversity of State and local regulation. Your analysis should consider the possibility of reducing as well as expanding State and local rulemaking.

The role of Federal regulation in facilitating U.S. participation in global markets should also be considered. Harmonization of U.S. and international rules may require a strong Federal regulatory role. Concerns that new U.S. rules could act as non-tariff barriers to imported goods should be evaluated carefully.

The Presumption Against Economic Regulation

Government actions can be unintentionally harmful, and even useful regulations can impede market efficiency. For this reason, there is a presumption against certain types of regulatory action. In light of both economic theory and actual experience, a particularly demanding burden of proof is required to demonstrate the need for any of the following types of regulations:

- price controls in competitive markets;

- production or sales quotas in competitive markets;
- mandatory uniform quality standards for goods or services if the potential problem can be adequately dealt with through voluntary standards or by disclosing information of the hazard to buyers or users; or
- controls on entry into employment or production, except (a) where indispensable to protect health and safety (e.g., FAA tests for commercial pilots) or (b) to manage the use of common property resources (e.g., fisheries, airwaves, Federal lands, and offshore areas).

C. Alternative Regulatory Approaches

Once you have determined that Federal regulatory action is appropriate, you will need to consider alternative regulatory approaches. Ordinarily, you will be able to eliminate some alternatives through a preliminary analysis, leaving a manageable number of alternatives to be evaluated according to the formal principles of the Executive Order. The number and choice of alternatives selected for detailed analysis is a matter of judgment. There must be some balance between thoroughness and the practical limits on your analytical capacity. With this qualification in mind, you should nevertheless explore modifications of some or all of a regulation's attributes or provisions to identify appropriate alternatives. The following is a list of alternative regulatory actions that you should consider.

Different Choices Defined by Statute

When a statute establishes a specific regulatory requirement and the agency is considering a more stringent standard, you should examine the benefits and costs of reasonable alternatives that reflect the range of the agency's statutory discretion, including the specific statutory requirement.

Different Compliance Dates

The timing of a regulation may also have an important effect on its net benefits. Benefits may vary significantly with different compliance dates where a delay in implementation may result in a substantial loss in future benefits (e.g., a delay in implementation could result in a significant reduction in spawning stock and jeopardize a fishery). Similarly, the cost of a regulation may vary substantially with different compliance dates for an industry that requires a year or more to plan its production runs. In this instance, a regulation that provides sufficient lead time is likely to achieve its goals at a much lower overall cost than a regulation that is effective immediately.

Different Enforcement Methods

Compliance alternatives for Federal, State, or local enforcement include on-site inspections, periodic reporting, and noncompliance penalties structured to provide the most appropriate incentives. When alternative monitoring and reporting methods vary in their benefits and costs, you should identify the most appropriate enforcement framework. For example, in

some circumstances random monitoring or parametric monitoring will be less expensive and nearly as effective as continuous monitoring.

Different Degrees of Stringency

In general, both the benefits and costs associated with a regulation will increase with the level of stringency (although marginal costs generally increase with stringency, whereas marginal benefits may decrease). You should study alternative levels of stringency to understand more fully the relationship between stringency and the size and distribution of benefits and costs among different groups.

Different Requirements for Different Sized Firms

You should consider setting different requirements for large and small firms, basing the requirements on estimated differences in the expected costs of compliance or in the expected benefits. The balance of benefits and costs can shift depending on the size of the firms being regulated. Small firms may find it more costly to comply with regulation, especially if there are large fixed costs required for regulatory compliance. On the other hand, it is not efficient to place a heavier burden on one segment of a regulated industry solely because it can better afford the higher cost. This has the potential to load costs on the most productive firms, costs that are disproportionate to the damages they create. You should also remember that a rule with a significant impact on a substantial number of small entities will trigger the requirements set forth in the Regulatory Flexibility Act. (5 U.S.C. 603(c), 604).

Different Requirements for Different Geographic Regions

Rarely do all regions of the country benefit uniformly from government regulation. It is also unlikely that costs will be uniformly distributed across the country. Where there are significant regional variations in benefits and/or costs, you should consider the possibility of setting different requirements for the different regions.

Performance Standards Rather than Design Standards

Performance standards express requirements in terms of outcomes rather than specifying the means to those ends. They are generally superior to engineering or design standards because performance standards give the regulated parties the flexibility to achieve regulatory objectives in the most cost-effective way. In general, you should take into account both the cost savings to the regulated parties of the greater flexibility and the costs of assuring compliance through monitoring or some other means.

Market-Oriented Approaches Rather than Direct Controls

Market-oriented approaches that use economic incentives should be explored. These alternatives include fees, penalties, subsidies, marketable permits or offsets, changes in liability or property rights (including policies that alter the incentives of insurers and insured parties), and required bonds, insurance or warranties. One example of a market-oriented approach is a

program that allows for averaging, banking, and/or trading (ABT) of credits for achieving additional emission reductions beyond the required air emission standards. ABT programs can be extremely valuable in reducing costs or achieving earlier or greater benefits, particularly when the costs of achieving compliance vary across production lines, facilities, or firms. ABT can be allowed on a plant-wide, firm-wide, or region-wide basis rather than vent by vent, provided this does not produce unacceptable local air quality outcomes (such as "hot spots" from local pollution concentration).

Informational Measures Rather than Regulation

If intervention is contemplated to address a market failure that arises from inadequate or asymmetric information, informational remedies will often be preferred. Measures to improve the availability of information include government establishment of a standardized testing and rating system (the use of which could be mandatory or voluntary), mandatory disclosure requirements (e.g., by advertising, labeling, or enclosures), and government provision of information (e.g., by government publications, telephone hotlines, or public interest broadcast announcements). A regulatory measure to improve the availability of information, particularly about the concealed characteristics of products, provides consumers a greater choice than a mandatory product standard or ban.

Specific informational measures should be evaluated in terms of their benefits and costs. Some effects of informational measures are easily overlooked. The costs of a mandatory disclosure requirement for a consumer product will include not only the cost of gathering and communicating the required information, but also the loss of net benefits of any information displaced by the mandated information. The other costs also may include the effect of providing information that is ignored or misinterpreted, and inefficiencies arising from the incentive that mandatory disclosure may give to overinvest in a particular characteristic of a product or service.

Where information on the benefits and costs of alternative informational measures is insufficient to provide a clear choice between them, you should consider the least intrusive informational alternative sufficient to accomplish the regulatory objective. To correct an informational market failure it may be sufficient for government to establish a standardized testing and rating system without mandating its use, because competing firms that score well according to the system should thereby have an incentive to publicize the fact.

D. Analytical Approaches

Both benefit-cost analysis (BCA) and cost-effectiveness analysis (CEA) provide a systematic framework for identifying and evaluating the likely outcomes of alternative regulatory choices. A major rulemaking should be supported by both types of analysis wherever possible. Specifically, you should prepare a CEA for all major rulemakings for which the primary benefits are improved public health and safety to the extent that a valid effectiveness measure can be developed to represent expected health and safety outcomes. You should also perform a BCA for major health and safety rulemakings to the extent that valid monetary values can be assigned to the primary expected health and safety outcomes. In undertaking these analyses, it is important to keep in mind the larger objective of analytical consistency in

estimating benefits and costs across regulations and agencies, subject to statutory limitations. Failure to maintain such consistency may prevent achievement of the most risk reduction for a given level of resource expenditure. For all other major rulemakings, you should carry out a BCA. If some of the primary benefit categories cannot be expressed in monetary units, you should also conduct a CEA. In unusual cases where no quantified information on benefits, costs and effectiveness can be produced, the regulatory analysis should present a qualitative discussion of the issues and evidence.

Benefit-Cost Analysis

A distinctive feature of BCA is that both benefits and costs are expressed in monetary units, which allows you to evaluate different regulatory options with a variety of attributes using a common measure.[4] By measuring incremental benefits and costs of successively more stringent regulatory alternatives, you can identify the alternative that maximizes net benefits.

The size of net benefits, the absolute difference between the projected benefits and costs, indicates whether one policy is more efficient than another. The ratio of benefits to costs is not a meaningful indicator of net benefits and should not be used for that purpose. It is well known that considering such ratios alone can yield misleading results.

Even when a benefit or cost cannot be expressed in monetary units, you should still try to measure it in terms of its physical units. If it is not possible to measure the physical units, you should still describe the benefit or cost qualitatively. For more information on describing qualitative information, see the section "*Developing Benefit and Cost Estimates.*"

When important benefits and costs cannot be expressed in monetary units, BCA is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs.

You should exercise professional judgment in identifying the importance of non-quantified factors and assess as best you can how they might change the ranking of alternatives based on estimated net benefits. If the non-quantified benefits and costs are likely to be important, you should recommend which of the non-quantified factors are of sufficient importance to justify consideration in the regulatory decision. This discussion should also include a clear explanation that support designating these non-quantified factors as important. In this case, you should also consider conducting a threshold analysis to help decision makers and other users of the analysis to understand the potential significance of these factors to the overall analysis.

Cost-Effectiveness Analysis[5]

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[4] Mishan EJ (1994), *Cost-Benefit Analysis*, fourth edition, Routledge, New York.

[5] For a full discussion of CEA, see Gold, ML, Siegel, JE, Russell, LB, and Weinstein, MC (1996), *Cost Effectiveness in Health and Medicine: The Report of the Panel on Cost-Effectiveness in Health and Medicine*, Oxford University Press, New York.

Cost-effectiveness analysis can provide a rigorous way to identify options that achieve the most effective use of the resources available without requiring monetization of all of relevant benefits or costs. Generally, cost-effectiveness analysis is designed to compare a set of regulatory actions with the same primary outcome (e.g., an increase in the acres of wetlands protected) or multiple outcomes that can be integrated into a single numerical index (e.g., units of health improvement).

Cost-effectiveness results based on averages need to be treated with great care. They suffer from the same drawbacks as benefit-cost ratios. The alternative that exhibits the smallest cost-effectiveness ratio may not be the best option, just as the alternative with the highest benefit-cost ratio is not always the one that maximizes net benefits. Incremental cost-effectiveness analysis (discussed below) can help to avoid mistakes that can occur when policy choices are based on average cost-effectiveness.

CEA can also be misleading when the "effectiveness" measure does not appropriately weight the consequences of the alternatives. For example, when effectiveness is measured in tons of reduced pollutant emissions, cost-effectiveness estimates will be misleading unless the reduced emissions of diverse pollutants result in the same health and environmental benefits.

When you have identified a range of alternatives (e.g., different levels of stringency), you should determine the cost-effectiveness of each option compared with the baseline as well as its incremental cost-effectiveness compared with successively more stringent requirements. Ideally, your CEA would present an array of cost-effectiveness estimates that would allow comparison across different alternatives. However, analyzing all possible combinations is not practical when there are many options (including possible interaction effects). In these cases, you should use your judgment to choose reasonable alternatives for careful consideration.

When constructing and comparing incremental cost-effectiveness ratios, you should be careful to determine whether the various alternatives are mutually exclusive or whether they can be combined. If they can be combined, you should consider which might be favored under different regulatory budget constraints (implicit or explicit). You should also make sure that inferior alternatives identified by the principles of strong and weak dominance are eliminated from consideration.[6]

The value of CEA is enhanced when there is consistency in the analysis across a diverse set of possible regulatory actions. To achieve consistency, you need to carefully construct the two key components of any CEA: the cost and the "effectiveness" or performance measures for the alternative policy options.

With regard to measuring costs, you should be sure to include all the relevant costs to society – whether public or private. Rulemakings may also yield cost savings (e.g., energy savings associated with new technologies). The numerator in the cost-effectiveness ratio should reflect net costs, defined as the gross cost incurred to comply with the requirements (sometimes

[6] Gold ML, Siegel JE, Russell LB, and Weinstein MC (1996), *Cost Effectiveness in Health and Medicine: The Report of the Panel on Cost-Effectiveness in Health and Medicine*, Oxford University Press, New York, pp. 284-285.

called "total" costs) minus any cost savings. You should be careful to avoid double-counting effects in both the numerator and the denominator of the cost-effectiveness ratios. For example, it would be incorrect to reduce gross costs by an estimated monetary value on life extension if life-years are already used as the effectiveness measure in the denominator.

In constructing measures of "effectiveness", final outcomes, such as lives saved or life-years saved, are preferred to measures of intermediate outputs, such as tons of pollution reduced, crashes avoided, or cases of disease avoided. Where the quality of the measured unit varies (e.g., acres of wetlands vary substantially in terms of their ecological benefits), it is important that the measure capture the variability in the value of the selected "outcome" measure. You should provide an explanation of your choice of effectiveness measure.

Where regulation may yield several different beneficial outcomes, a cost-effectiveness comparison becomes more difficult to interpret because there is more than one measure of effectiveness to incorporate in the analysis. To arrive at a single measure you will need to weight the value of disparate benefit categories, but this computation raises some of the same difficulties you will encounter in BCA. If you can assign a reasonable monetary value to all of the regulation's different benefits, then you should do so. But in this case, you will be doing BCA, not CEA.

When you can estimate the monetary value of *some* but not all of the ancillary benefits of a regulation, but cannot assign a monetary value to the primary measure of effectiveness, you should subtract the monetary estimate of the ancillary benefits from the gross cost estimate to yield an estimated net cost. (This net cost estimate for the rule may turn out to be negative – that is, the monetized benefits exceed the cost of the rule.) If you are unable to estimate the value of some of the ancillary benefits, the cost-effectiveness ratio will be overstated, and this should be acknowledged in your analysis. CEA does not yield an unambiguous choice when there are benefits or costs that have not been incorporated in the net-cost estimates. You also may use CEA to compare regulatory alternatives in cases where the statute specifies the level of benefits to be achieved.

The Effectiveness Metric for Public Health and Safety Rulemakings

When CEA is applied to public health and safety rulemakings, one or more measures of effectiveness must be selected that permits comparison of regulatory alternatives. Agencies currently use a variety of effectiveness measures.

There are relatively simple measures such as the number of lives saved, cases of cancer reduced, and cases of paraplegia prevented. Sometimes these measures account only for mortality information, such as the number of lives saved and the number of years of life saved. There are also more comprehensive, integrated measures of effectiveness such as the number of "equivalent lives" (ELs) saved and the number of "quality-adjusted life years" (QALYs) saved.

The main advantage of the integrated measures of effectiveness is that they account for a rule's impact on morbidity (nonfatal illness, injury, impairment and quality of life) as well as premature death. The inclusion of morbidity effects is important because (a) some illnesses (e.g.,

asthma) cause more instances of pain and suffering than they do premature death, (b) some population groups are known to experience elevated rates of morbidity (e.g, the elderly and the poor) and thus have a strong interest in morbidity measurement[7], and (c) some regulatory alternatives may be more effective at preventing morbidity than premature death (e.g., some advanced airbag designs may diminish the nonfatal injuries caused by airbag inflation without changing the frequency of fatal injury prevented by airbags).

However, the main drawback of these integrated measures is that they must meet some restrictive assumptions to represent a valid measure of individual preferences.[8] For example, a QALY measure implicitly assumes that the fraction of remaining lifespan an individual would give up for an improvement in health-related quality of life does not depend on the remaining lifespan. Thus, if an individual is willing to give up 10 years of life among 50 remaining years for a given health improvement, he or she would also be willing to give up 1 year of life among 5 remaining years. To the extent that individual preferences deviate from these assumptions, analytic results from CEA using QALYs could differ from analytic results based on willingness-to-pay-measures.[9] Though willingness to pay is generally the preferred economic method for evaluating preferences, the CEA method, as applied in medicine and health, does not evaluate health changes using individual willingness to pay. When performing CEA, you should consider using at least one integrated measure of effectiveness when a rule creates a significant impact on both mortality and morbidity.

When CEA is performed in specific rulemaking contexts, you should be prepared to make appropriate adjustments to ensure fair treatment of all segments of the population. Fairness is important in the choice and execution of effectiveness measures. For example, if QALYs are used to evaluate a lifesaving rule aimed at a population that happens to experience a high rate of disability (i.e., where the rule is not designed to affect the disability), the number of life years saved should not necessarily be diminished simply because the rule saves the lives of people with life-shortening disabilities. Both analytic simplicity and fairness suggest that the estimated number of life years saved for the disabled population should be based on average life expectancy information for the relevant age cohorts. More generally, when numeric adjustments are made for life expectancy or quality of life, analysts should prefer use of population averages rather than information derived from subgroups dominated by a particular demographic or income group.

OMB does not require agencies to use any specific measure of effectiveness. In fact, OMB encourages agencies to report results with multiple measures of effectiveness that offer different insights and perspectives. The regulatory analysis should explain which measures were selected and why, and how they were implemented.

The analytic discretion provided in choice of effectiveness measure will create some inconsistency in how agencies evaluate the same injuries and diseases, and it will be difficult for

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[7] Russell LB and Sisk JE (2000), "Modeling Age Differences in Cost Effectiveness Analysis", *International Journal of Technology Assessment in Health Care*, 16(4), 1158-1167.

[8] Pliskin JS, Shepard DS, and Weinstein MC (1980), "Utility Functions for Life Years and Health Status," *Operations Research*, 28(1), 206-224.

[9] Hammitt JK (2002), "QALYs Versus WTP," *Risk Analysis*, 22(5), pp. 985-1002.

OMB and the public to draw meaningful comparisons between rulemakings that employ different effectiveness measures. As a result, agencies should use their web site to provide OMB and the public with the underlying data, including mortality and morbidity data, the age distribution of the affected populations, and the severity and duration of disease conditions and trauma, so that OMB and the public can construct apples-to-apples comparisons between rulemakings that employ different measures.

There are sensitive technical and ethical issues associated with choosing one or more of these integrated measures for use throughout the Federal government. The Institute of Medicine (IOM) may assemble a panel of specialists in cost-effectiveness analysis and bioethics to evaluate the advantages and disadvantages of these different measures and other measures that have been suggested in the academic literature. OMB believes that the IOM guidance will provide Federal agencies and OMB useful insight into how to improve the measurement of effectiveness of public health and safety regulations.

Distributional Effects

Those who bear the costs of a regulation and those who enjoy its benefits often are not the same people. The term "distributional effect" refers to the impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography). Benefits and costs of a regulation may also be distributed unevenly over time, perhaps spanning several generations. Distributional effects may arise through "transfer payments" that stem from a regulatory action as well. For example, the revenue collected through a fee, surcharge in excess of the cost of services provided, or tax is a transfer payment.

Your regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency. Executive Order 12866 authorizes this approach. Where distributive effects are thought to be important, the effects of various regulatory alternatives should be described quantitatively to the extent possible, including the magnitude, likelihood, and severity of impacts on particular groups. You should be alert for situations in which regulatory alternatives result in significant changes in treatment or outcomes for different groups. Effects on the distribution of income that are transmitted through changes in market prices can be important, albeit sometimes difficult to assess. Your analysis should also present information on the streams of benefits and costs over time in order to provide a basis for assessing intertemporal distributional consequences, particularly where intergenerational effects are concerned.

E. Identifying and Measuring Benefits and Costs

This Section provides guidelines for your preparation of the benefit and cost estimates required by Executive Order 12866 and the "Regulatory Right-to-Know Act." The discussions in previous sections will help you identify a workable number of alternatives for consideration in your analysis and an appropriate analytical approach to use.

General Issues

1. Scope of Analysis

Your analysis should focus on benefits and costs that accrue to citizens and residents of the United States. Where you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately. The time frame for your analysis should cover a period long enough to encompass all the important benefits and costs likely to result from the rule.

2. Developing a Baseline

You need to measure the benefits and costs of a rule against a baseline. This baseline should be the best assessment of the way the world would look absent the proposed action. The choice of an appropriate baseline may require consideration of a wide range of potential factors, including:

- evolution of the market,
- changes in external factors affecting expected benefits and costs,
- changes in regulations promulgated by the agency or other government entities, and
- the degree of compliance by regulated entities with other regulations.

It may be reasonable to forecast that the world absent the regulation will resemble the present. If this is the case, however, your baseline should reflect the future effect of current government programs and policies. For review of an existing regulation, a baseline assuming "no change" in the regulatory program generally provides an appropriate basis for evaluating regulatory alternatives. When more than one baseline is reasonable and the choice of baseline will significantly affect estimated benefits and costs, you should consider measuring benefits and costs against alternative baselines. In doing so you can analyze the effects on benefits and costs of making different assumptions about other agencies' regulations, or the degree of compliance with your own existing rules. In all cases, you must evaluate benefits and costs against the same baseline. You should also discuss the reasonableness of the baselines used in the sensitivity analyses. For each baseline you use, you should identify the key uncertainties in your forecast.

EPA's 1998 final PCB disposal rule provides a good example of using different baselines. EPA used several alternative baselines, each reflecting a different interpretation of existing regulatory requirements. In particular, one baseline reflected a literal interpretation of EPA's 1979 rule and another the actual implementation of that rule in the year immediately preceding the 1998 revision. The use of multiple baselines illustrated the substantial effect changes in EPA's implementation policy could have on the cost of a regulatory program. In the years after EPA adopted the 1979 PCB disposal rule, changes in EPA policy -- especially allowing the disposal of automobile "shredder fluff" in municipal landfills -- reduced the cost of the program by more than $500 million per year.

In some cases, substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action. In these cases,

you should use a pre-statute baseline. If you are able to separate out those areas where the agency has discretion, you may also use a post-statute baseline to evaluate the discretionary elements of the action.

3. Evaluation of Alternatives

You should describe the alternatives available to you and the reasons for choosing one alternative over another. As noted previously, alternatives that rely on incentives and offer increased flexibility are often more cost-effective than more prescriptive approaches. For instance, user fees and information dissemination may be good alternatives to direct command-and-control regulation. Within a command-and-control regulatory program, performance-based standards generally offer advantages over standards specifying design, behavior, or manner of compliance.

You should carefully consider all appropriate alternatives for the key attributes or provisions of the rule. The previous discussion outlines examples of appropriate alternatives. Where there is a "continuum" of alternatives for a standard (such as the level of stringency), you generally should analyze at least three options: the preferred option; a more stringent option that achieves additional benefits (and presumably costs more) beyond those realized by the preferred option; and a less stringent option that costs less (and presumably generates fewer benefits) than the preferred option.

You should choose reasonable alternatives deserving careful consideration. In some cases, a regulatory program will focus on an option that is near or at the limit of technical feasibility. In this case, the analysis would not need to examine a more stringent option. For each of the options analyzed, you should compare the anticipated benefits to the corresponding costs.

It is not adequate simply to report a comparison of the agency's preferred option to the chosen baseline. Whenever you report the benefits and costs of alternative options, you should present both total and incremental benefits and costs. You should present incremental benefits and costs as differences from the corresponding estimates associated with the next less-stringent alternative.[10] It is important to emphasize that incremental effects are simply differences between successively more stringent alternatives. Results involving a comparison to a "next best" alternative may be especially useful.

In some cases, you may decide to analyze a wide array of options. In 1998, DOE analyzed a large number of options in setting new energy efficiency standards for refrigerators and freezers and produced a rich amount of information on their relative effects. This analysis -- examining more than 20 alternative performance standards for one class of refrigerators with top-mounted freezers -- enabled DOE to select an option that produced $200 more in estimated net benefits per refrigerator than the least attractive option.

[10] For the least stringent alternative, you should estimate the incremental benefits and costs relative to the baseline. Thus, for this alternative, the incremental effects would be the same as the corresponding totals. For each alternative that is more stringent than the least stringent alternative, you should estimate the incremental benefits and costs relative to the closest less-stringent alternative.

You should analyze the benefits and costs of different regulatory provisions separately when a rule includes a number of distinct provisions. If the existence of one provision affects the benefits or costs arising from another provision, the analysis becomes more complicated, but the need to examine provisions separately remains. In this case, you should evaluate each specific provision by determining the net benefits of the proposed regulation with and without it.

Analyzing all possible combinations of provisions is impractical if the number is large and interaction effects are widespread. You need to use judgment to select the most significant or relevant provisions for such analysis. You are expected to document all of the alternatives that were considered in a list or table and which were selected for emphasis in the main analysis.

You should also discuss the statutory requirements that affect the selection of regulatory approaches. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, you should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act.

4. Transparency and Reproducibility of Results

Because of its influential nature and its special role in the rulemaking process, it is appropriate to set minimum quality standards for regulatory analysis. You should provide documentation that the analysis is based on the best reasonably obtainable scientific, technical, and economic information available. To achieve this, you should rely on peer-reviewed literature, where available, and provide the source for all original information.

A good analysis should be transparent and your results must be reproducible. You should clearly set out the basic assumptions, methods, and data underlying the analysis and discuss the uncertainties associated with the estimates. A qualified third party reading the analysis should be able to understand the basic elements of your analysis and the way in which you developed your estimates.

To provide greater access to your analysis, you should generally post it, with all the supporting documents, on the internet so the public can review the findings. You should also disclose the use of outside consultants, their qualifications, and history of contracts and employment with the agency (e.g., in a preface to the RIA). Where other compelling interests (such as privacy, intellectual property, trade secrets, etc.) prevent the public release of data or key elements of the analysis, you should apply especially rigorous robustness checks to analytic results and document the analytical checks used.

Finally, you should assure compliance with the Information Quality Guidelines for your agency and OMB's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" ("data quality guidelines") http://www.whitehouse.gov/omb/fedreg/reproducible.html.

Developing Benefit and Cost Estimates

1. Some General Considerations

The analysis document should discuss the expected benefits and costs of the selected regulatory option and any reasonable alternatives. How is the proposed action expected to provide the anticipated benefits and costs? What are the monetized values of the potential real incremental benefits and costs to society? To present your results, you should:

- include separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs, and express the estimates in this table in constant, undiscounted dollars (for more on discounting see "*Discount Rates*" below);
- list the benefits and costs you can quantify, but cannot monetize, including their timing;
- describe benefits and costs you cannot quantify; and
- identify or cross-reference the data or studies on which you base the benefit and cost estimates.

When benefit and cost estimates are uncertain (for more on this see "*Treatment of Uncertainty*" below), you should report benefit and cost estimates (including benefits of risk reductions) that reflect the full probability distribution of potential consequences. Where possible, present probability distributions of benefits and costs and include the upper and lower bound estimates as complements to central tendency and other estimates.

If fundamental scientific disagreement or lack of knowledge prevents construction of a scientifically defensible probability distribution, you should describe benefits or costs under plausible scenarios and characterize the evidence and assumptions underlying each alternative scenario.

2. The Key Concepts Needed to Estimate Benefits and Costs

"Opportunity cost" is the appropriate concept for valuing both benefits and costs. The principle of "willingness-to-pay" (WTP) captures the notion of opportunity cost by measuring what individuals are willing to forgo to enjoy a particular benefit. In general, economists tend to view WTP as the most appropriate measure of opportunity cost, but an individual's "willingness-to-accept" (WTA) compensation for not receiving the improvement can also provide a valid measure of opportunity cost.

WTP and WTA are comparable measures under special circumstances. WTP and WTA measures may be comparable in the following situations: if a regulation affects a price change rather than a quantity change; the change being evaluated is small; there are reasonably close substitutes available; and the income effect is small.[11] However, empirical evidence from experimental economics and psychology shows that even when income/wealth effects are "small", the measured differences between WTP and WTA can be large.[12] WTP is generally

[11] See Hanemann WM (1991), *American Economic Review*, 81(3), 635-647.

[12] See Kahneman D, Knetsch JL, and Thaler RH (1991), "Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias," *Journal of Economic Perspectives* 3(1), 192-206.

considered to be more readily measurable. Adoption of WTP as the measure of value implies that individual preferences of the affected population should be a guiding factor in the regulatory analysis.

Market prices provide rich data for estimating benefits and costs based on willingness-to-pay if the goods and services affected by the regulation are traded in well-functioning competitive markets. The opportunity cost of an alternative includes the value of the benefits forgone as a result of choosing that alternative. The opportunity cost of banning a product -- a drug, food additive, or hazardous chemical -- is the forgone net benefit (i.e., lost consumer and producer surplus[13]) of that product, taking into account the mitigating effects of potential substitutes.

The use of any resource has an opportunity cost regardless of whether the resource is already owned or has to be purchased. That opportunity cost is equal to the net benefit the resource would have provided in the absence of the requirement. For example, if regulation of an industrial plant affects the use of additional land or buildings within the existing plant boundary, the cost analysis should include the opportunity cost of using the additional land or facilities.

To the extent possible, you should monetize any such forgone benefits and add them to the other costs of that alternative. You should also try to monetize any cost savings as a result of an alternative and either add it to the benefits or subtract it from the costs of that alternative. However, you should not assume that the "avoided" costs of not doing another regulatory alternative represent the benefits of a regulatory action where there is no direct, necessary relationship between the two. You should also be careful when the costs avoided are attributable to an existing regulation. Even when there is a direct relationship between the two regulatory actions, the use of avoided costs is problematic because the existing regulation may not maximize net benefits and thus may itself be questionable policy. (See the section, "Direct Use of Market Data," for more detail.)

Estimating benefits and costs when market prices are hard to measure or markets do not exist is more difficult. In these cases, you need to develop appropriate proxies that simulate market exchange. Estimates of willingness-to-pay based on revealed preference methods can be quite useful. As one example, analysts sometimes use "hedonic price equations" based on multiple regression analysis of market behavior to simulate market prices for the commodity of interest. The hedonic technique allows analysts to develop an estimate of the price for specific attributes associated with a product. For instance, a house is a product characterized by a variety of attributes including the number of rooms, total floor area, and type of heating and cooling. If there are enough data on transactions in the housing market, it is possible to develop an estimate of the implicit price for specific attributes, such as the implicit price of an additional bathroom or for central air conditioning. This technique can be extended, as well, to develop an estimate for

[13] Consumer surplus is the difference between what a consumer pays for a unit of a good and the maximum amount the consumer would be willing to pay for that unit. It is measured by the area between the price and the demand curve for that unit. Producer surplus is the difference between the amount a producer is paid for a unit of a good and the minimum amount the producer would accept to supply that unit. It is measured by the area between the price and the supply curve for that unit.

the implicit price of public goods that are not directly traded in markets. An analyst can develop implicit price estimates for public goods like air quality and access to public parks by assessing the effects of these goods on the housing market. Going through the analytical process of deriving benefit estimates by simulating markets may also suggest alternative regulatory strategies that create such markets.

You need to guard against double-counting, since some attributes are embedded in other broader measures. To illustrate, when a regulation improves the quality of the environment in a community, the value of real estate in the community generally rises to reflect the greater attractiveness of living in a better environment. Simply adding the increase in property values to the estimated value of improved public health would be double counting if the increase in property values reflects the improvement in public health. To avoid this problem you should separate the embedded effects on the value of property arising from improved public health. At the same time, an analysis that fails to incorporate the consequence of land use changes when accounting for costs will not capture the full effects of regulation.

3. Revealed Preference Methods

Revealed preference methods develop estimates of the value of goods and services -- or attributes of those goods and services -- based on actual market decisions by consumers, workers and other market participants. If the market participant is well informed and confronted with a real choice, it may be feasible to determine accurately and precisely the monetary value needed for a rulemaking. There is a large and well-developed literature on revealed preference in the peer-reviewed, applied economics literature.

Although these methods are well grounded in economic theory, they are sometimes difficult to implement given the complexity of market transactions and the paucity of relevant data. When designing or evaluating a revealed preference study, the following principles should be considered:

- the market should be competitive. If the market isn't competitive (e.g., monopoly, oligopoly), then you should consider making adjustments such that the price reflects the true value to society (often called the "shadow price");
- the market should not exhibit a significant information gap or asymmetric information problem. If the market suffers from information problems, then you should discuss the divergence of the price from the underlying shadow price and consider possible adjustments to reflect the underlying shadow price;
- the market should not exhibit an externality. In this case, you should discuss the divergence of the price from the underlying shadow price and consider possible adjustments to reflect the underlying shadow price;
- the specific market participants being studied should be representative of the target populations to be affected by the rulemaking under consideration;
- a valid research design and framework for analysis should be adopted. Examples include using data and/or model specifications that include the markets for substitute and complementary goods and services and using reasonably unrestricted functional forms. When specifying substitute and complementary goods, the analysis should preferably be

based on data about the range of alternatives perceived by market participants. If such data are not available, you should adopt plausible assumptions and describe the limitations of the analysis.

- the statistical and econometric models employed should be appropriate for the application and the resulting estimates should be robust in response to plausible changes in model specification and estimation technique; and
- the results should be consistent with economic theory.

You should also determine whether there are multiple revealed-preference studies of the same good or service and whether anything can be learned by comparing the methods, data and findings from different studies. Professional judgment is required to determine whether a particular study is of sufficient quality to justify use in regulatory analysis. When studies are used in regulatory analysis despite their technical weaknesses (e.g., due to the absence of other evidence), the regulatory analysis should discuss any biases or uncertainties that are likely to arise due to those weaknesses. If a study has major weaknesses, the study should not be used in regulatory analysis.

a. Direct Uses of Market Data

Economists ordinarily consider market prices as the most accurate measure of the marginal value of goods and services to society. In some instances, however, market prices may not reflect the true value of goods and services due to market imperfections or government intervention. If a regulation involves changes to goods or services where the market price is not a good measure of the value to society, you should use an estimate that reflects the shadow price. Suppose a particular air pollutant damages crops. One of the benefits of controlling that pollutant is the value of the crop yield increase as a result of the controls. That value is typically measured by the price of the crop. However, if the price is held above the market price by a government program that affects supply, a value estimate based on this price may not reflect the true benefits of controlling the pollutant. In this case, you should calculate the value to society of the increase in crop yields by estimating the shadow price, which reflects the value to society of the marginal use of the crop. If the marginal use is for exports, you should use the world price. If the marginal use is to add to very large surplus stockpiles, you should use the value of the last units released from storage minus storage cost. If stockpiles are large and growing, the shadow price may be low or even negative.

Other goods whose market prices may not reflect their true value include those whose production or consumption results in substantial (1) positive or negative external effects or (2) transfer payments. For example, the observed market price of gasoline may not reflect marginal social value due to the inclusion of taxes, other government interventions, and negative externalities (e.g., pollution). This shadow price may also be needed for goods whose market price is substantially affected by existing regulations that do not maximize net benefits.

b. Indirect Uses of Market Data

Many goods or attributes of goods that are affected by regulation--such as preserving environmental or cultural amenities--are not traded directly in markets. The value for these

goods or attributes arise both from use and non-use. Estimation of these values is difficult because of the absence of an organized market. However, overlooking or ignoring these values in your regulatory analysis may significantly understate the benefits and/or costs of regulatory action.

"Use values" arise where an individual derives satisfaction from using the resource, either now or in the future. Use values are associated with activities such as swimming, hunting, and hiking where the individual makes use of the natural environment.

"Non-use values" arise where an individual places value on a resource, good or service even though the individual will not use the resource, now or in the future. Non-use value includes bequest and existence values.

General altruism for the health and welfare of others is a closely related concept but may not be strictly considered a "non-use" value.[14] A general concern for the welfare of others should supplement benefits and costs equally; hence, it is not necessary to measure the size of general altruism in regulatory analysis. If there is evidence of selective altruism, it needs to be considered specifically in both benefits and costs.

Some goods and services are indirectly traded in markets, which means that their value is reflected in the prices of related goods and services that are directly traded in markets. Their use values are typically estimated through revealed preference methods. Examples include estimates of the values of environmental amenities derived from travel-cost studies, and hedonic price models that measure differences or changes in the value of real estate. It is important that you utilize revealed preference models that adhere to economic criteria that are consistent with utility maximizing behavior. Also, you should take particular care in designing protocols for reliably estimating the values of these attributes.

4. Stated Preference Methods

Stated Preference Methods (SPM) have been developed and used in the peer-reviewed literature to estimate both "use" and "non-use" values of goods and services. They have also been widely used in regulatory analyses by Federal agencies, in part, because these methods can be creatively employed to address a wide variety of goods and services that are not easy to study through revealed preference methods.

The distinguishing feature of these methods is that hypothetical questions about use or non-use values are posed to survey respondents in order to obtain willingness-to-pay estimates relevant to benefit or cost estimation. Some examples of SPM include contingent valuation, conjoint analysis and risk-tradeoff analysis. The surveys used to obtain the health-utility values used in CEA are similar to stated-preference surveys but do not entail monetary measurement of value. Nevertheless, the principles governing quality stated-preference research, with some obvious exceptions involving monetization, are also relevant in designing quality health-utility research.

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[14] See McConnell KE (1997), *Journal of Environmental Economics and Management*, *32*, 22-37.

When you are designing or evaluating a stated-preference study, the following principles should be considered:

- the good or service being evaluated should be explained to the respondent in a clear, complete and objective fashion, and the survey instrument should be pre-tested;
- willingness-to-pay questions should be designed to focus the respondent on the reality of budgetary limitations and alerted to the availability of substitute goods and alternative expenditure options;
- the survey instrument should be designed to probe beyond general attitudes (e.g., a "warm glow" effect for a particular use or non-use value) and focus on the magnitude of the respondent's economic valuation;
- the analytic results should be consistent with economic theory using both "internal" (within respondent) and "external" (between respondent) scope tests such as the willingness to pay is larger (smaller) when more (less) of a good is provided;
- the subjects being interviewed should be selected/sampled in a statistically appropriate manner. The sample frame should adequately cover the target population. The sample should be drawn using probability methods in order to generalize the results to the target population;
- response rates should be as high as reasonably possible. Best survey practices should be followed to achieve high response rates. Low response rates increase the potential for bias and raise concerns about the generalizability of the results. If response rates are not adequate, you should conduct an analysis of non-response bias or further study. Caution should be used in assessing the representativeness of the sample based solely on demographic profiles. Statistical adjustments to reduce non-response bias should be undertaken whenever feasible and appropriate;
- the mode of administration of surveys (in-person, phone, mail, computer, internet or multiple modes) should be appropriate in light of the nature of the questions being posed to respondents and the length and complexity of the instrument;
- documentation should be provided about the target population, the sampling frame used and its coverage of the target population, the design of the sample including any stratification or clustering, the cumulative response rate (including response rate at each stage of selection if applicable); the item non-response rate for critical questions; the exact wording and sequence of questions and other information provided to respondents; and the training of interviewers and techniques they employed (as appropriate);
- the statistical and econometric methods used to analyze the collected data should be transparent, well suited for the analysis, and applied with rigor and care.

Professional judgment is necessary to apply these criteria to one or more studies, and thus there is no mechanical formula that can be used to determine whether a particular study is of sufficient quality to justify use in regulatory analysis. When studies are used despite having weaknesses on one or more of these criteria, those weaknesses should be acknowledged in the regulatory analysis, including any resulting biases or uncertainties that are likely to result. If a study has too many weaknesses with unknown consequences for the quality of the data, the study should not be used.

The challenge in designing quality stated-preference studies is arguably greater for non-use values and unfamiliar use values than for familiar goods or services that are traded (directly or indirectly) in market transactions. The good being valued may have little meaning to respondents, and respondents may be forming their valuations for the first time in response to the questions posed. Since these values are effectively constructed by the respondent during the elicitation, the instrument and mode of administration should be rigorously pre-tested to make sure that responses are not simply an artifact of specific features of instrument design and/or mode of administration.

Since SPM generate data from respondents in a hypothetical setting, often on complex and unfamiliar goods, special care is demanded in the design and execution of surveys, analysis of the results, and characterization of the uncertainties. A stated-preference study may be the only way to obtain quantitative information about non-use values, though a number based on a poor quality study is not necessarily superior to no number at all. Non-use values that are not quantified should be presented as an "intangible" benefit or cost.

If both revealed-preference and stated-preference studies that are directly applicable to regulatory analysis are available, you should consider both kinds of evidence and compare the findings. If the results diverge significantly, you should compare the overall size and quality of the two bodies of evidence. Other things equal, you should prefer revealed preference data over stated preference data because revealed preference data are based on actual decisions, where market participants enjoy or suffer the consequences of their decisions. This is not generally the case for respondents in stated preference surveys, where respondents may not have sufficient incentives to offer thoughtful responses that are more consistent with their preferences or may be inclined to bias their responses for one reason or another.

5. Benefit-Transfer Methods

It is often preferable to collect original data on revealed preference or stated preference to support regulatory analysis. Yet conducting an original study may not be feasible due to the time and expense involved. One alternative to conducting an original study is the use of "benefit transfer" methods. (The transfer may involve cost determination as well). The practice of "benefit transfer" began with transferring existing estimates obtained from indirect market and stated preference studies to new contexts (i.e., the context posed by the rulemaking). The principles that guide transferring estimates from indirect market and stated preference studies should apply to direct market studies as well.

Although benefit-transfer can provide a quick, low-cost approach for obtaining desired monetary values, the methods are often associated with uncertainties and potential biases of unknown magnitude. It should therefore be treated as a last-resort option and not used without explicit justification.

In conducting benefit transfer, the first step is to specify the value to be estimated for the rulemaking. You should identify the relevant measure of the policy change at this initial stage. For instance, you can derive the relevant willingness-to-pay measure by specifying an indirect utility function. This identification allows you to "zero in" on key aspects of the benefit transfer.

The next step is to identify appropriate studies to conduct benefit transfer. In selecting transfer studies for either point transfers or function transfers, you should base your choices on the following criteria:

- The selected studies should be based on adequate data, sound and defensible empirical methods and techniques.
- The selected studies should document parameter estimates of the valuation function.
- The study context and policy context should have similar populations (e.g., demographic characteristics). The market size (e.g., target population) between the study site and the policy site should be similar. For example, a study valuing water quality improvement in Rhode Island should not be used to value policy that will affect water quality throughout the United States.
- The good, and the magnitude of change in that good, should be similar in the study and policy contexts.
- The relevant characteristics of the study and the policy contexts should be similar. For example, the effects examined in the original study should be "reversible" or "irreversible" to a degree that is similar to the regulatory actions under consideration.
- The distribution of property rights should be similar so that the analysis uses the same welfare measure. If the property rights in the study context support the use of WTA measures while the rights in the rulemaking context support the use of WTP measures, benefit transfer is not appropriate.
- The availability of substitutes across study and policy contexts should be similar.

If you can choose between transferring a function or a point estimate, you should transfer the entire demand function (referred to as benefit function transfer) rather than adopting a single point estimate (referred to as benefit point transfer).[15]

Finally, you should not use benefit transfer in estimating benefits if:

- resources are unique or have unique attributes. For example, if a policy change affects snowmobile use in Yellowstone National Park, then a study valuing snowmobile use in the state of Michigan should not be used to value changes in snowmobile use in the Yellowstone National Park.
- If the study examines a resource that is unique or has unique attributes, you should not transfer benefit estimates or benefit functions to value a different resource and vice versa. For example, if a study values visibility improvements at the Grand Canyon, these results should not be used to value visibility improvements in urban areas.
- There are significant problems with applying an *"ex ante"* valuation estimate to an *"ex post"* policy context. If a policy yields a significant change in the attributes of the good, you should not use the study estimates to value the change using a benefit transfer approach.
- You also should not use a value developed from a study involving, small marginal

[15] See Loomis JB (1992), *Water Resources Research, 28*(3), 701-705 and Kirchoff, S, Colby, BG, and LaFrance, JT (1997), *Journal of Environmental Economics and Management, 33*, 75-93.

changes in a policy context involving large changes in the quantity of the good.

Clearly, all of these criteria are difficult to meet. However, you should attempt to satisfy as many as possible when choosing studies from the existing economic literature. Professional judgment is required in determining whether a particular transfer is too speculative to use in regulatory analysis.

6. Ancillary Benefits and Countervailing Risks

Your analysis should look beyond the direct benefits and direct costs of your rulemaking and consider any important ancillary benefits and countervailing risks. An ancillary benefit is a favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking (e.g., reduced refinery emissions due to more stringent fuel economy standards for light trucks) while a countervailing risk is an adverse economic, health, safety, or environmental consequence that occurs due to a rule and is not already accounted for in the direct cost of the rule (e.g., adverse safety impacts from more stringent fuel-economy standards for light trucks).

You should begin by considering and perhaps listing the possible ancillary benefits and countervailing risks. However, highly speculative or minor consequences may not be worth further formal analysis. Analytic priority should be given to those ancillary benefits and countervailing risks that are important enough to potentially change the rank ordering of the main alternatives in the analysis. In some cases the mere consideration of these secondary effects may help in the generation of a superior regulatory alternative with strong ancillary benefits and fewer countervailing risks. For instance, a recent study suggested that weight-based, fuel-economy standards could achieve energy savings with fewer safety risks and employment losses than would occur under the current regulatory structure.

Like other benefits and costs, an effort should be made to quantify and monetize ancillary benefits and countervailing risks. If monetization is not feasible, quantification should be attempted through use of informative physical units. If both monetization and quantification are not feasible, then these issues should be presented as non-quantified benefits and costs. The same standards of information and analysis quality that apply to direct benefits and costs should be applied to ancillary benefits and countervailing risks.

One way to combine ancillary benefits and countervailing risks is to evaluate these effects separately and then put both of these effects on the benefits side, not on the cost side. Although it is theoretically appropriate to include disbenefits on the cost side, legal and programmatic considerations generally support subtracting the disbenefits from direct benefits.

7. Methods for Treating Non-Monetized Benefits and Costs

Sound quantitative estimates of benefits and costs, where feasible, are preferable to qualitative descriptions of benefits and costs because they help decision makers understand the magnitudes of the effects of alternative actions. However, some important benefits and costs (e.g., privacy protection) may be inherently too difficult to quantify or monetize given current

data and methods. You should carry out a careful evaluation of non-quantified benefits and costs. Some authorities[16] refer to these non-monetized and non-quantified effects as "intangible".

a. Benefits and Costs that are Difficult to Monetize

You should monetize quantitative estimates whenever possible. Use sound and defensible values or procedures to monetize benefits and costs, and ensure that key analytical assumptions are defensible. If monetization is impossible, explain why and present all available quantitative information. For example, if you can quantify but cannot monetize increases in water quality and fish populations resulting from water quality regulation, you can describe benefits in terms of stream miles of improved water quality for boaters and increases in game fish populations for anglers. You should describe the timing and likelihood of such effects and avoid double-counting of benefits when estimates of monetized and physical effects are mixed in the same analysis.

b. Benefits and Costs that are Difficult to Quantify

If you are not able to quantify the effects, you should present any relevant quantitative information along with a description of the unquantified effects, such as ecological gains, improvements in quality of life, and aesthetic beauty. You should provide a discussion of the strengths and limitations of the qualitative information. This should include information on the key reason(s) why they cannot be quantified. In one instance, you may know with certainty the magnitude of a risk to which a substantial, but unknown, number of individuals are exposed. In another instance, the existence of a risk may be based on highly speculative assumptions, and the magnitude of the risk may be unknown.

For cases in which the unquantified benefits or costs affect a policy choice, you should provide a clear explanation of the rationale behind the choice. Such an explanation could include detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs. Also, please include a summary table that lists all the unquantified benefits and costs, and use your professional judgment to highlight (e.g., with categories or rank ordering) those that you believe are most important (e.g., by considering factors such as the degree of certainty, expected magnitude, and reversibility of effects).

While the focus is often placed on difficult to quantify benefits of regulatory action, some costs are difficult to quantify as well. Certain permitting requirements (e.g., EPA's New Source Review program) restrict the decisions of production facilities to shift to new products and adopt innovative methods of production. While these programs may impose substantial costs on the economy, it is very difficult to quantify and monetize these effects. Similarly, regulations that establish emission standards for recreational vehicles, like motor bikes, may adversely affect the performance of the vehicles in terms of driveability and 0 to 60 miles per hour acceleration. Again, the cost associated with the loss of these attributes may be difficult to quantify and monetize. They need to be analyzed qualitatively.

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[16] Mishan EJ (1994), *Cost-Benefit Analysis*, fourth edition, Routledge, New York.

8. Monetizing Health and Safety Benefits and Costs

We expect you to provide a benefit-cost analysis of major health and safety rulemakings in addition to a CEA. The BCA provides additional insight because (a) it provides some indication of what the public is willing to pay for improvements in health and safety and (b) it offers additional information on preferences for health using a different research design than is used in CEA. Since the health-preference methods used to support CEA and BCA have some different strengths and drawbacks, it is important that you provide decision makers with both perspectives.

In monetizing health benefits, a WTP measure is the conceptually appropriate measure as compared to other alternatives (e.g., cost of illness or lifetime earnings), in part because it attempts to capture pain and suffering and other quality-of-life effects. Using the WTP measure for health and safety allows you to directly compare your results to the other benefits and costs in your analysis, which will typically be based on WTP.

If well-conducted revealed-preference studies of relevant health and safety risks are available, you should consider using them in developing your monetary estimates. If appropriate revealed-preference data are not available, you should use valid and relevant data from stated-preference studies. You will need to use your professional judgment when you are faced with limited information on revealed preference studies and substantial information based on stated preference studies.

A key advantage of stated-preference and health-utility methods compared to revealed preference methods is that they can be tailored to address the ranges of probabilities, types of health risks and specific populations affected by your rule. In many rulemakings there will be no relevant information from revealed-preference studies. In this situation you should consider commissioning a stated-preference study or using values from published stated-preference studies. For the reasons discussed previously, you should be cautious about using values from stated-preference studies and describe in the analysis the drawbacks of this approach.

a. Nonfatal Health and Safety Risks

With regard to nonfatal health and safety risks, there is enormous diversity in the nature and severity of impaired health states. A traumatic injury that can be treated effectively in the emergency room without hospitalization or long-term care is different from a traumatic injury resulting in paraplegia. Severity differences are also important in evaluation of chronic diseases. A severe bout of bronchitis, though perhaps less frequent, is far more painful and debilitating than the more frequent bouts of mild bronchitis. The duration of an impaired health state, which can range from a day or two to several years or even a lifetime (e.g., birth defects inducing mental retardation), need to be considered carefully. Information on both the severity and duration of an impaired health state is necessary before the task of monetization can be performed.

When monetizing nonfatal health effects, it is important to consider two components: (1) the private demand for prevention of the nonfatal health effect, to be represented by the

preferences of the target population at risk, and (2) the net financial externalities associated with poor health such as net changes in public medical costs and any net changes in economic production that are not experienced by the target population. Revealed-preference or stated-preference studies are necessary to estimate the private demand; health economics data from published sources can typically be used to estimate the financial externalities caused by changes in health status. If you use literature values to monetize nonfatal health and safety risks, it is important to make sure that the values you have selected are appropriate for the severity and duration of health effects to be addressed by your rule.

If data are not available to support monetization, you might consider an alternative approach that makes use of health-utility studies. Although the economics literature on the monetary valuation of impaired health states is growing, there is a much larger clinical literature on how patients, providers and community residents value diverse health states. This literature typically measures health utilities based on the standard gamble, the time tradeoff or the rating scale methods. This health utility information may be combined with known monetary values for well-defined health states to estimate monetary values for a wide range of health states of different severity and duration. If you use this approach, you should be careful to acknowledge your assumptions and the limitations of your estimates.

b. Fatality Risks

Since agencies often design health and safety regulation to reduce risks to life, evaluation of these benefits can be the key part of the analysis. A good analysis must present these benefits clearly and show their importance. Agencies may choose to monetize these benefits. The willingness-to-pay approach is the best methodology to use if reductions in fatality risk are monetized.

Some describe the monetized value of small changes in fatality risk as the "value of statistical life" (VSL) or, less precisely, the "value of a life." The latter phrase can be misleading because it suggests erroneously that the monetization exercise tries to place a "value" on individual lives. You should make clear that these terms refer to the measurement of willingness to pay for reductions in only small risks of premature death. They have no application to an identifiable individual or to very large reductions in individual risks. They do not suggest that any individual's life can be expressed in monetary terms. Their sole purpose is to help describe better the likely benefits of a regulatory action.

Confusion about the term "statistical life" is also widespread. This term refers to the sum of risk reductions expected in a population. For example, if the annual risk of death is reduced by one in a million for each of two million people, that is said to represent two "statistical lives" extended per year (2 million people x 1/1,000,000 = 2). If the annual risk of death is reduced by one in 10 million for each of 20 million people, that also represents two statistical lives extended.

The adoption of a value for the projected reduction in the risk of premature mortality is the subject of continuing discussion within the economic and public policy analysis community. A considerable body of academic literature is available on this subject. This literature involves either explicit or implicit valuation of fatality risks, and generally involves the use of estimates of

VSL from studies on wage compensation for occupational hazards (which generally are in the range of 10^{-4} annually), on consumer product purchase and use decisions, or from an emerging literature using stated preference approaches. A substantial majority of the resulting estimates of VSL vary from roughly $1 million to $10 million per statistical life.[17]

There is a continuing debate within the economic and public policy analysis community on the merits of using a single VSL for all situations versus adjusting the VSL estimates to reflect the specific rule context. A variety of factors have been identified, including whether the mortality risk involves sudden death, the fear of cancer, and the extent to which the risk is voluntarily incurred.[18] The consensus of EPA's recent Science Advisory Board (SAB) review of this issue was that the available literature does not support adjustments of VSL for most of these factors. The panel did conclude that it was appropriate to adjust VSL to reflect changes in income and any time lag in the occurrence of adverse health effects.

The age of the affected population has also been identified as an important factor in the theoretical literature. However, the empirical evidence on age and VSL is mixed. In light of the continuing questions over the effect of age on VSL estimates, you should not use an age-adjustment factor in an analysis using VSL estimates.[19]

Another way that has been used to express reductions in fatality risks is to use the life expectancy method, the "value of statistical life-years (VSLY) extended." If a regulation protects individuals whose average remaining life expectancy is 40 years, a risk reduction of one fatality is expressed as "40 life-years extended." Those who favor this alternative approach emphasize that the value of a statistical life is not a single number relevant for all situations. In particular, when there are significant differences between the effect on life expectancy for the population affected by a particular health risk and the populations studied in the labor market studies, they prefer to adopt a VSLY approach to reflect those differences. You should consider providing estimates of both VSL and VSLY, while recognizing the developing state of knowledge in this area.

Longevity may be only one of a number of relevant considerations pertaining to the rule. You should keep in mind that regulations with greater numbers of life-years extended are not necessarily better than regulations with fewer numbers of life-years extended. In any event, when you present estimates based on the VSLY method, you should adopt a larger VSLY estimate for senior citizens because senior citizens face larger overall health risks from all causes and they may have accumulated savings to spend on their health and safety.[20]

The valuation of fatality risk reduction is an evolving area in both results and methodology. Hence, you should utilize valuation methods that you consider appropriate for the

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[17] See Viscusi WK and Aldy JE, *Journal of Risk and Uncertainty* (forthcoming) and Mrozek JR and Taylor LO (2002), *Journal of Policy Analysis and Management, 21*(2), 253-270.

[18] Distinctions between "voluntary" and "involuntary" should be treated with care. Risks are best considered to fall within a continuum from "voluntary" to "involuntary" with very few risks at either end of this range. These terms are also related to differences in the cost of avoiding risks.

[19] Graham JD (2003), Memorandum to the President's Management Council, Benefit-Cost Methods and Lifesaving Rules. This memorandum can be found at http://www.whitehouse.gov/omb/inforeg/pmc_benefit_cost_memo.pdf

[20] Office of Information and Regulatory Affairs, OMB, Memorandum to the President's Management Council, ibid.

regulatory circumstances. Since the literature-based VSL estimates may not be entirely appropriate for the risk being evaluated (e.g., the use of occupational risk premia to value reductions in risks from environmental hazards), you should explain your selection of estimates and any adjustments of the estimates to reflect the nature of the risk being evaluated. You should present estimates based on alternative approaches, and if you monetize mortality risk reduction, you should do so on a consistent basis to the extent feasible. You should clearly indicate the methodology used and document your choice of a particular methodology. You should explain any significant deviations from the prevailing state of knowledge. If you use different methodologies in different rules, you should clearly disclose the fact and explain your choices.

c. Valuation of Reductions in Health and Safety Risks to Children

The valuation of health outcomes for children and infants poses special challenges. It is rarely feasible to measure a child's willingness to pay for health improvement and an adult's concern for his or her own health is not necessarily relevant to valuation of child health. For example, the wage premiums demanded by workers to accept hazardous jobs are not readily transferred to rules that accomplish health gains for children.

There are a few studies that examine parental willingness to pay to invest in health and safety for their children. Some of these studies suggest that parents may value children's health more strongly than their own health. Although this parental perspective is a promising research strategy, it may need to be expanded to include a societal interest in child health and safety.

Where the primary objective of a rule is to reduce the risk of injury, disease or mortality among children, you should conduct a cost-effectiveness analysis of the rule. You may also develop a benefit-cost analysis to the extent that valid monetary values can be assigned to the primary expected health outcomes. For rules where health gains are expected among both children and adults and you decide to perform a benefit-cost analysis, the monetary values for children should be at least as large as the values for adults (for the same probabilities and outcomes) unless there is specific and compelling evidence to suggest otherwise.[21]

Discount Rates

Benefits and costs do not always take place in the same time period. When they do not, it is incorrect simply to add all of the expected net benefits or costs without taking account of when the actually occur. If benefits or costs are delayed or otherwise separated in time from each other, the difference in timing should be reflected in your analysis.

As a first step, you should present the annual time stream of benefits and costs expected to result from the rule, clearly identifying when the benefits and costs are expected to occur. The beginning point for your stream of estimates should be the year in which the final rule will begin to have effects, even if that is expected to be some time in the future. The ending point should be far enough in the future to encompass all the significant benefits and costs likely to result from the rule.

[21] For more information, see Dockins C., Jenkins RR, Owens N, Simon NB, and Wiggins LB (2002), *Risk Analysis*, 22(2), 335-346.

In presenting the stream of benefits and costs, it is important to measure them in constant dollars to avoid the misleading effects of inflation in your estimates. If the benefits and costs are initially measured in prices reflecting expected future inflation, you can convert them to constant dollars by dividing through by an appropriate inflation index, one that corresponds to the inflation rate underlying the initial estimates of benefits or costs.

1. The Rationale for Discounting

Once these preliminaries are out of the way, you can begin to adjust your estimates for differences in timing. (This is a separate calculation from the adjustment needed to remove the effects of future inflation.) Benefits or costs that occur sooner are generally more valuable. The main rationales for the discounting of future impacts are:

(a) Resources that are invested will normally earn a positive return, so current consumption is more expensive than future consumption, since you are giving up that expected return on investment when you consume today.
(b) Postponed benefits also have a cost because people generally prefer present to future consumption. They are said to have positive time preference.
(c) Also, if consumption continues to increase over time, as it has for most of U.S. history, an increment of consumption will be less valuable in the future than it would be today, because the principle of diminishing marginal utility implies that as total consumption increases, the value of a marginal unit of consumption tends to decline.

There is wide agreement with point (a). Capital investment is productive, but that point is not sufficient by itself to explain positive interest rates and observed saving behavior. To understand these phenomena, points (b) and (c) are also necessary. If people are really indifferent between consumption now and later, then they should be willing to forgo current consumption in order to consume an equal or slightly greater amount in the future. That would cause saving rates and investment to rise until interest rates were driven to zero and capital was no longer productive. As long as we observe positive interest rates and saving rates below 100 percent, people must be placing a higher value on current consumption than on future consumption.

To reflect this preference, a discount factor should be used to adjust the estimated benefits and costs for differences in timing. The further in the future the benefits and costs are expected to occur, the more they should be discounted. The discount factor can be calculated given a discount rate. The formula is $1/(1+\text{the discount rate})^t$ where "t" measures the number of years in the future that the benefits or costs are expected to occur. Benefits or costs that have been adjusted in this way are called "discounted present values" or simply "present values". When, and only when, the estimated benefits and costs have been discounted, they can be added to determine the overall value of net benefits.

2. Real Discount Rates of 3 Percent and 7 Percent

OMB's basic guidance on the discount rate is provided in OMB Circular A-94 (http://www.whitehouse.gov/omb/circulars/index.html). This Circular points out that the analytically preferred method of handling temporal differences between benefits and costs is to adjust all the benefits and costs to reflect their value in equivalent units of consumption and to discount them at the rate consumers and savers would normally use in discounting future consumption benefits. This is sometimes called the "shadow price" approach to discounting because doing such calculations requires you to value benefits and costs using shadow prices, especially for capital goods, to correct for market distortions. These shadow prices are not well established for the United States. Furthermore, the distribution of impacts from regulations on capital and consumption are not always well known. Consequently, any agency that wishes to tackle this challenging analytical task should check with OMB before proceeding.

As a default position, OMB Circular A-94 states that a real discount rate of 7 percent should be used as a base-case for regulatory analysis. The 7 percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy. It is a broad measure that reflects the returns to real estate and small business capital as well as corporate capital. It approximates the opportunity cost of capital, and it is the appropriate discount rate whenever the main effect of a regulation is to displace or alter the use of capital in the private sector. OMB revised Circular A-94 in 1992 after extensive internal review and public comment. In a recent analysis, OMB found that the average rate of return to capital remains near the 7 percent rate estimated in 1992. Circular A-94 also recommends using other discount rates to show the sensitivity of the estimates to the discount rate assumption.

Economic distortions, including taxes on capital, create a divergence between the rate of return that savers earn and the private rate of return to capital. This divergence persists despite the tendency for capital to flow to where it can earn the highest rate of return. Although market forces will push after-tax rates of return in different sectors of the economy toward equality, that process will not equate pre-tax rates of return when there are differences in the tax treatment of investment. Corporate capital, in particular, pays an additional layer of taxation, the corporate income tax, which requires it to earn a higher pre-tax rate of return in order to provide investors with similar after-tax rates of return compared with non-corporate investments. The pre-tax rates of return better measure society's gains from investment. Since the rates of return on capital are higher in some sectors of the economy than others, the government needs to be sensitive to possible impacts of regulatory policy on capital allocation.

The effects of regulation do not always fall exclusively or primarily on the allocation of capital. When regulation primarily and directly affects private consumption (e.g., through higher consumer prices for goods and services), a lower discount rate is appropriate. The alternative most often used is sometimes called the "social rate of time preference." This simply means the rate at which "society" discounts future consumption flows to their present value. If we take the rate that the average saver uses to discount future consumption as our measure of the social rate of time preference, then the real rate of return on long-term government debt may provide a fair approximation. Over the last thirty years, this rate has averaged around 3 percent in real terms on a pre-tax basis. For example, the yield on 10-year Treasury notes has averaged 8.1 percent since

1973 while the average annual rate of change in the CPI over this period has been 5.0 percent, implying a real 10-year rate of 3.1 percent.

For regulatory analysis, you should provide estimates of net benefits using both 3 percent and 7 percent. An example of this approach is EPA's analysis of its 1998 rule setting both effluent limits for wastewater discharges and air toxic emission limits for pulp and paper mills. In this analysis, EPA developed its present-value estimates using real discount rates of 3 and 7 percent applied to benefit and cost streams that extended forward for 30 years. You should present a similar analysis in your own work.

In some instances, if there is reason to expect that the regulation will cause resources to be reallocated away from private investment in the corporate sector, then the opportunity cost may lie outside the range of 3 to 7 percent. For example, the average real rate of return on corporate capital in the United States was approximately 10 percent in the 1990s, returning to the same level observed in the 1950s and 1960s. If you are uncertain about the nature of the opportunity cost, then you should present benefit and cost estimates using a higher discount rate as a further sensitivity analysis as well as using the 3 and 7 percent rates.

3. Time Preference for Health-Related Benefits and Costs

When future benefits or costs are health-related, some have questioned whether discounting is appropriate, since the rationale for discounting money may not appear to apply to health. It is true that lives saved today cannot be invested in a bank to save more lives in the future. But the resources that would have been used to save those lives can be invested to earn a higher payoff in future lives saved. People have been observed to prefer health gains that occur immediately to identical health gains that occur in the future. Also, if future health gains are not discounted while future costs are, then the following perverse result occurs: an attractive investment today in future health improvement can always be made more attractive by delaying the investment. For such reasons, there is a professional consensus that future health effects, including both benefits and costs, should be discounted at the same rate. This consensus applies to both BCA and CEA.

A common challenge in health-related analysis is to quantify the time lag between when a rule takes effect and when the resulting physical improvements in health status will be observed in the target population. In such situations, you must carefully consider the timing of health benefits before performing present-value calculations. It is not reasonable to assume that all of the benefits of reducing chronic diseases such as cancer and cardiovascular disease will occur immediately when the rule takes effect. For rules addressing traumatic injury, this lag period may be short. For chronic diseases it may take years or even decades for a rule to induce its full beneficial effects in the target population.

When a delay period between exposure to a toxin and increased probability of disease is likely (a so-called latency period), a lag between exposure reduction and reduced probability of disease is also likely. This latter period has sometimes been referred to as a "cessation lag," and it may or may not be of the same duration as the latency period. As a general matter, cessation lags will only apply to populations with at least some high-level exposure (e.g., before the rule

takes effect). For populations with no such prior exposure, such as those born after the rule takes effect, only the latency period will be relevant.

Ideally, your exposure-risk model would allow calculation of reduced risk for each year following exposure cessation, accounting for total cumulative exposure and age at the time of exposure reduction. The present-value benefits estimate could then reflect an appropriate discount factor for each year's risk reduction. Recent analyses of the cancer benefits stemming from reduction in public exposure to radon in drinking water have adopted this approach. They were supported by formal risk-assessment models that allowed estimates of the timing of lung cancer incidence and mortality to vary in response to different radon exposure levels.[22]

In many cases, you will not have the benefit of such detailed risk assessment modeling. You will need to use your professional judgment as to the average cessation lag for the chronic diseases affected by your rule. In situations where information exists on latency but not on cessation lags, it may be reasonable to use latency as a proxy for the cessation lag, unless there is reason to believe that the two are different. When the average lag time between exposures and disease is unknown, a range of plausible alternative values for the time lag should be used in your analysis.

4. Intergenerational Discounting

Special ethical considerations arise when comparing benefits and costs across generations. Although most people demonstrate time preference in their own consumption behavior, it may not be appropriate for society to demonstrate a similar preference when deciding between the well-being of current and future generations. Future citizens who are affected by such choices cannot take part in making them, and today's society must act with some consideration of their interest.

One way to do this would be to follow the same discounting techniques described above and supplement the analysis with an explicit discussion of the intergenerational concerns (how future generations will be affected by the regulatory decision). Policymakers would be provided with this additional information without changing the general approach to discounting.

Using the same discount rate across generations has the advantage of preventing time-inconsistency problems. For example, if one uses a lower discount rate for future generations, then the evaluation of a rule that has short-term costs and long-term benefits would become more favorable merely by waiting a year to do the analysis. Further, using the same discount rate across generations is attractive from an ethical standpoint. If one expects future generations to be better off, then giving them the advantage of a lower discount rate would in effect transfer resources from poorer people today to richer people tomorrow.

Some believe, however, that it is ethically impermissible to discount the utility of future generations. That is, government should treat all generations equally. Even under this approach,

[22] Committee on Risk Assessment of Exposure to Radon in Drinking Water, Board on Radiation Effects Research, Commission on Life Sciences (1996), *Risk Assessment of Radon in Drinking Water*, National Research Council, National Academy Press, Washington, DC.

it would still be correct to discount future costs and consumption benefits generally (perhaps at a lower rate than for intragenerational analysis), due to the expectation that future generations will be wealthier and thus will value a marginal dollar of benefits or costs by less than those alive today. Therefore, it is appropriate to discount future benefits and costs relative to current benefits and costs, even if the welfare of future generations is not being discounted. Estimates of the appropriate discount rate appropriate in this case, from the 1990s, ranged from 1 to 3 percent per annum.[23]

A second reason for discounting the benefits and costs accruing to future generations at a lower rate is increased uncertainty about the appropriate value of the discount rate, the longer the horizon for the analysis. Private market rates provide a reliable reference for determining how society values time within a generation, but for extremely long time periods no comparable private rates exist. As explained by Martin Weitzman[24], in the limit for the deep future, the properly averaged certainty-equivalent discount factor (i.e., $1/[1+r]^t$) corresponds to the minimum discount rate having any substantial positive probability. From today's perspective, the only relevant limiting scenario is the one with the lowest discount rate – all of the other states at the far-distant time are relatively much less important because their expected present value is so severely reduced by the power of compounding at a higher rate.

If your rule will have important intergenerational benefits or costs you might consider a further sensitivity analysis using a lower but positive discount rate in addition to calculating net benefits using discount rates of 3 and 7 percent.

5. Time Preference for Non-Monetized Benefits and Costs

Differences in timing should be considered even for benefits and costs that are not expressed in monetary units, including health benefits. The timing differences can be handled through discounting. EPA estimated cost-effectiveness in its 1998 rule, "Control of Emissions from Nonroad Diesel Engines," by discounting both the monetary costs and the non-monetized emission reduction benefits over the expected useful life of the engines at the 7 percent real rate recommended in OMB Circular A-94.

Alternatively, it may be possible in some cases to avoid discounting non-monetized benefits. If the expected flow of benefits begins as soon as the cost is incurred and is expected to be constant over time, then annualizing the cost stream is sufficient, and further discounting of benefits is unnecessary. Such an analysis might produce an estimate of the annualized cost per ton of reduced emissions of a pollutant.

6. The Internal Rate of Return

The internal rate of return is the discount rate that sets the net present value of the discounted benefits and costs equal to zero. The internal rate of return does not generally

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[23] Portney PR and Weyant JP, eds. (1999), *Discounting and Intergenerational Equity*, Resources for the Future, Washington, DC.

[24] Weitzman ML In Portney PR and Weyant JP, eds. (1999), *Discounting and Intergenerational Equity*, Resources for the Future, Washington, DC.

provide an acceptable decision criterion, and regulations with the highest internal rate of return are not necessarily the most beneficial. Nevertheless, it does provide useful information and for many it will offer a meaningful indication of regulation's impact. You should consider including the internal rate of return implied by your regulatory analysis along with other information about discounted net present values.

Other Key Considerations

1. Other Benefit and Cost Considerations

You should include these effects in your analysis and provide estimates of their monetary values when they are significant:

- Private-sector compliance costs and savings;
- Government administrative costs and savings;
- Gains or losses in consumers' or producers' surpluses;
- Discomfort or inconvenience costs and benefits; and
- Gains or losses of time in work, leisure and/or commuting/travel settings.

Estimates of benefits and costs should be based on credible changes in technology over time. For example, retrospective studies may provide evidence that "learning" will likely reduce the cost of regulation in future years. The weight you give to a study of past rates of cost savings resulting from innovation (including "learning curve" effects) should depend on both its timeliness and direct relevance to the processes affected by the regulatory alternative under consideration. In addition, you should take into account cost-saving innovations that result from a shift to regulatory performance standards and incentive-based policies. On the other hand, significant costs may result from a slowing in the rate of innovation or of adoption of new technology due to delays in the regulatory approval process or the setting of more stringent standards for new facilities than existing ones. In some cases agencies are limited under statute to consider only technologies that have been demonstrated to be feasible. In these situations, it may be useful to estimate costs and cost savings assuming a wider range of technical possibilities.

When characterizing technology changes over time, you should assess the likely technology changes that would have occurred in the absence of the regulatory action (technology baseline). Technologies change over time in both reasonably functioning markets and imperfect markets. If you assume that technology will remain unchanged in the absence of regulation when technology changes are likely, then your analysis will over-state both the benefits and costs attributable to the regulation.

Occasionally, cost savings or other forms of benefits accrue to parties affected by a rule who also bear its costs. For example, a requirement that engine manufacturers reduce emissions from engines may lead to technologies that improve fuel economy. These fuel savings will normally accrue to the engine purchasers, who also bear the costs of the technologies. There is no apparent market failure with regard to the market value of fuel saved because one would expect that consumers would be willing to pay for increased fuel economy that exceeded the cost

of providing it. When these cost savings are substantial, and particularly when you estimate them to be greater than the cost associated with achieving them, you should examine and discuss why market forces would not accomplish these gains in the absence of regulation. As a general matter, any direct costs that are averted as a result of a regulatory action should be monetized wherever possible and either added to the benefits or subtracted from the costs of that alternative.

2. The Difference between Costs (or Benefits) and Transfer Payments

Distinguishing between real costs and transfer payments is an important, but sometimes difficult, problem in cost estimation. Benefit and cost estimates should reflect real resource use. Transfer payments are monetary payments from one group to another that do not affect total resources available to society. A regulation that restricts the supply of a good, causing its price to rise, produces a transfer from buyers to sellers. The net reduction in the total surplus (consumer plus producer) is a real cost to society, but the transfer from buyers to sellers resulting from a higher price is not a real cost since the net reduction automatically accounts for the transfer from buyers to sellers. However, transfers from the United States to other nations should be included as costs, and transfers from other nations to the United States as benefits, as long as the analysis is conducted from the United States perspective.

You should not include transfers in the estimates of the benefits and costs of a regulation. Instead, address them in a separate discussion of the regulation's distributional effects. Examples of transfer payments include the following:

- Scarcity rents and monopoly profits
- Insurance payments
- Indirect taxes and subsidies

Treatment of Uncertainty

The precise consequences (benefits and costs) of regulatory options are not always known for certain, but the probability of their occurrence can often be developed. The important uncertainties connected with your regulatory decisions need to be analyzed and presented as part of the overall regulatory analysis. You should begin your analysis of uncertainty at the earliest possible stage in developing your analysis. You should consider both the statistical variability of key elements underlying the estimates of benefits and costs (for example, the expected change in the distribution of automobile accidents that might result from a change in automobile safety standards) and the incomplete knowledge about the relevant relationships (for example, the uncertain knowledge of how some economic activities might affect future climate change).[25] By assessing the sources of uncertainty and the way in which benefit and cost estimates may be affected under plausible assumptions, you can shape your analysis to inform decision makers and the public about the effects and the uncertainties of alternative regulatory actions.

[25] In some contexts, the word "variability" is used as a synonym for statistical variation that can be described by a theoretically valid distribution function, whereas "uncertainty" refers to a more fundamental lack of knowledge. Throughout this discussion, we use the term "uncertainty" to refer to both concepts.

The treatment of uncertainty must be guided by the same principles of full disclosure and transparency that apply to other elements of your regulatory analysis. Your analysis should be credible, objective, realistic, and scientifically balanced.[26] Any data and models that you use to analyze uncertainty should be fully identified. You should also discuss the quality of the available data used. Inferences and assumptions used in your analysis should be identified, and your analytical choices should be explicitly evaluated and adequately justified. In your presentation, you should delineate the strengths of your analysis along with any uncertainties about its conclusions. Your presentation should also explain how your analytical choices have affected your results.

In some cases, the level of scientific uncertainty may be so large that you can only present discrete alternative scenarios without assessing the relative likelihood of each scenario quantitatively. For instance, in assessing the potential outcomes of an environmental effect, there may be a limited number of scientific studies with strongly divergent results. In such cases, you might present results from a range of plausible scenarios, together with any available information that might help in qualitatively determining which scenario is most likely to occur.

When uncertainty has significant effects on the final conclusion about net benefits, your agency should consider additional research prior to rulemaking. The costs of being wrong may outweigh the benefits of a faster decision. This is true especially for cases with irreversible or large upfront investments. If your agency decides to proceed with rulemaking, you should explain why the costs of developing additional information—including any harm from delay in public protection—exceed the value of that information.

For example, when the uncertainty is due to a lack of data, you might consider deferring the decision, as an explicit regulatory alternative, pending further study to obtain sufficient data.[27] Delaying a decision will also have costs, as will further efforts at data gathering and analysis. You will need to weigh the benefits of delay against these costs in making your decision. Formal tools for assessing the value of additional information are now well developed in the applied decision sciences and can be used to help resolve this type of complex regulatory question.

"Real options" methods have also formalized the valuation of the added flexibility inherent in delaying a decision. As long as taking time will lower uncertainty, either passively or actively through an investment in information gathering, and some costs are irreversible, such as the potential costs of a sunk investment, a benefit can be assigned to the option to delay a decision. That benefit should be considered a cost of taking immediate action versus the alternative of delaying that action pending more information. However, the burdens of delay—including any harm to public health, safety, and the environment—need to be analyzed carefully.

1. Quantitative Analysis of Uncertainty

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[26] When disseminating information, agencies should follow their own information quality guidelines, issued in conformance with the OMB government-wide guidelines (67 FR 8452, February 22, 2002).

[27] Clemen RT (1996), *Making Hard Decisions: An Introduction to Decision Analysis*, second edition, Duxbury Press, Pacific Grove.

Examples of quantitative analysis, broadly defined, would include formal estimates of the probabilities of environmental damage to soil or water, the possible loss of habitat, or risks to endangered species as well as probabilities of harm to human health and safety. There are also uncertainties associated with estimates of economic benefits and costs, such as the cost savings associated with increased energy efficiency. Thus, your analysis should include two fundamental components: a quantitative analysis characterizing the probabilities of the relevant outcomes and an assignment of economic value to the projected outcomes. It is essential that both parts be conceptually consistent. In particular, the quantitative analysis should be conducted in a way that permits it to be applied within a more general analytical framework, such as benefit-cost analysis. Similarly, the general framework needs to be flexible enough to incorporate the quantitative analysis without oversimplifying the results. For example, you should address explicitly the implications for benefits and costs of any probability distributions developed in your analysis.

As with other elements of regulatory analysis, you will need to balance thoroughness with the practical limits on your analytical capabilities. Your analysis does not have to be exhaustive, nor is it necessary to evaluate each alternative at every step. Attention should be devoted to first resolving or studying the uncertainties that have the largest potential effect on decision making. Many times these will be the largest sources of uncertainties. In the absence of adequate data, you will need to make assumptions. These should be clearly identified and consistent with the relevant science. Your analysis should provide sufficient information for decision makers to grasp the degree of scientific uncertainty and the robustness of estimated probabilities, benefits, and costs to changes in key assumptions.

For major rules involving annual economic effects of $1 billion or more, you should present a formal quantitative analysis of the relevant uncertainties about benefits and costs. In other words, you should try to provide some estimate of the probability distribution of regulatory benefits and costs. In summarizing the probability distributions, you should provide some estimates of the central tendency (e.g., mean and median) along with any other information you think will be useful such as ranges, variances, specified low-end and high-end percentile estimates, and other characteristics of the distribution.

Your estimates cannot be more precise than their most uncertain component. Thus, your analysis should report estimates in a way that reflects the degree of uncertainty and not create a false sense of precision. Worst-case or conservative analyses are not usually adequate because they do not convey the complete probability distribution of outcomes, and they do not permit calculation of an expected value of net benefits. In many health and safety rules, economists conducting benefit-cost analyses must rely on formal risk assessments that address a variety of risk management questions such as the baseline risk for the affected population, the safe level of exposure or, the amount of risk to be reduced by various interventions. Because the answers to some of these questions are directly used in benefits analyses, the risk assessment methodology must allow for the determination of expected benefits in order to be comparable to expected costs. This means that conservative assumptions and defaults (whether motivated by science policy or by precautionary instincts), will be incompatible with benefit analyses as they will result in benefit estimates that exceed the expected value. Whenever it is possible to characterize quantitatively the probability distributions, some estimates of expected value (e.g., mean and

median) must be provided in addition to ranges, variances, specified low-end and high-end percentile estimates, and other characteristics of the distribution.

Whenever possible, you should use appropriate statistical techniques to determine a probability distribution of the relevant outcomes. For rules that exceed the $1 billion annual threshold, a formal quantitative analysis of uncertainty is required. For rules with annual benefits and/or costs in the range from 100 million to $1 billion, you should seek to use more rigorous approaches with higher consequence rules. This is especially the case where net benefits are close to zero. More rigorous uncertainty analysis may not be necessary for rules in this category if simpler techniques are sufficient to show robustness. You may consider the following analytical approaches that entail increasing levels of complexity:

- Disclose qualitatively the main uncertainties in each important input to the calculation of benefits and costs. These disclosures should address the uncertainties in the data as well as in the analytical results. However, major rules above the $1 billion annual threshold require a formal treatment.
- Use a numerical sensitivity analysis to examine how the results of your analysis vary with plausible changes in assumptions, choices of input data, and alternative analytical approaches. Sensitivity analysis is especially valuable when the information is lacking to carry out a formal probabilistic simulation. Sensitivity analysis can be used to find "switch points" -- critical parameter values at which estimated net benefits change sign or the low cost alternative switches. Sensitivity analysis usually proceeds by changing one variable or assumption at a time, but it can also be done by varying a combination of variables simultaneously to learn more about the robustness of your results to widespread changes. Again, however, major rules above the $1 billion annual threshold require a formal treatment.
- Apply a formal probabilistic analysis of the relevant uncertainties – possibly using simulation models and/or expert judgment as revealed, for example, through Delphi methods.[28] Such a formal analytical approach is appropriate for complex rules where there are large, multiple uncertainties whose analysis raises technical challenges, or where the effects cascade; it is required for rules that exceed the $1 billion annual threshold. For example, in the analysis of regulations addressing air pollution, there is uncertainty about the effects of the rule on future emissions, uncertainty about how the change in emissions will affect air quality, uncertainty about how changes in air quality will affect health, and finally uncertainty about the economic and social value of the change in health outcomes. In formal probabilistic assessments, expert solicitation is a useful way to fill key gaps in your ability to assess uncertainty.[29] In general, experts can be used to quantify the probability distributions of key parameters and relationships. These solicitations, combined with other sources of data, can be combined in Monte Carlo simulations to derive a probability distribution of benefits and costs. You should

[28] The purpose of Delphi methods is to generate suitable information for decision making by eliciting expect judgment. The elicitation is conducted through a survey process which eliminates the interactions between experts. See Morgan MG and Henrion M (1990), *Uncertainty: A Guide to Dealing with Uncertainty in Quantitative Riskand Policy Analysis*, Cambridge University Press.

[29] Cooke RM (1991), *Experts in Uncertainty: Opinion and Subjective Probability in Science*, Oxford University Press.

pay attention to correlated inputs. Often times, the standard defaults in Monte Carlo and other similar simulation packages assume independence across distributions. Failing to correctly account for correlated distributions of inputs can cause the resultant output uncertainty intervals to be too large, although in many cases the overall effect is ambiguous. You should make a special effort to portray the probabilistic results—in graphs and/or tables—clearly and meaningfully.

New methods may become available in the future. This document is not intended to discourage or inhibit their use, but rather to encourage and stimulate their development.

2. Economic Values of Uncertain Outcomes

In developing benefit and cost estimates, you may find that there are probability distributions of values as well for each of the outcomes. Where this is the case, you will need to combine these probability distributions to provide estimated benefits and costs.

Where there is a distribution of outcomes, you will often find it useful to emphasize summary statistics or figures that can be readily understood and compared to achieve the broadest public understanding of your findings. It is a common practice to compare the "best estimates" of both benefits and costs with those of competing alternatives. These "best estimates" are usually the average or the expected value of benefits and costs. Emphasis on these expected values is appropriate as long as society is "risk neutral" with respect to the regulatory alternatives. While this may not always be the case, you should in general assume "risk neutrality" in your analysis. If you adopt a different assumption on risk preference, you should explain your reasons for doing so.

3. Alternative Assumptions

If benefit or cost estimates depend heavily on certain assumptions, you should make those assumptions explicit and carry out sensitivity analyses using plausible alternative assumptions. If the value of net benefits changes from positive to negative (or vice versa) or if the relative ranking of regulatory options changes with alternative plausible assumptions, you should conduct further analysis to determine which of the alternative assumptions is more appropriate. Because different estimation methods may have hidden assumptions, you should analyze estimation methods carefully to make any hidden assumptions explicit.

F. Specialized Analytical Requirements

In preparing analytical support for your rulemaking, you should be aware that there are a number of analytic requirements imposed by law and Executive Order. In addition to the regulatory analysis requirements of Executive Order 12866, you should also consider whether your rule will need specialized analysis of any of the following issues.

Impact on Small Businesses and Other Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. chapter 6), agencies must prepare a proposed and final "regulatory flexibility analysis" (RFA) if the rulemaking could "have a significant impact on a substantial number of small entities." You should consider posting your RFA on the internet so the public can review your findings.

Your agency should have guidelines on how to prepare an RFA and you are encouraged to consult with the Chief Counsel for Advocacy of the Small Business Administration on expectations concerning what is an adequate RFA. Executive Order 13272 (67 FR 53461, August 16, 2002) requires you to notify the Chief Counsel for Advocacy of any draft rules that might have a significant economic impact on a substantial number of small entities. Executive Order 13272 also directs agencies to give every appropriate consideration to any comments provided by the Advocacy Office. Under SBREFA, EPA and OSHA are required to consult with small business prior to developing a proposed rule that would have a significant effect on small businesses. OMB encourages other agencies to do so as well.

Analysis of Unfunded Mandates

Under the Unfunded Mandates Act (2 U.S.C. 1532), you must prepare a written statement about benefits and costs prior to issuing a proposed or final rule (for which your agency published a proposed rule) that may result in aggregate expenditure by State, local, and tribal governments, or by the private sector, of $100,000,000 or more in any one year (adjusted annually for inflation). Your analytical requirements under Executive Order 12866 are similar to the analytical requirements under this Act, and thus the same analysis may permit you to comply with both analytical requirements.

Information Collection, Paperwork, and Recordkeeping Burdens

Under the Paperwork Reduction Act (44 U.S.C. chapter 35), you will need to consider whether your rulemaking (or other actions) will create any additional information collection, paperwork or recordkeeping burdens. These burdens are permissible only if you can justify the practical utility of the information for the implementation of your rule. OMB approval will be required of any new requirements for a collection of information imposed on 10 or more persons and a valid OMB control number must be obtained for any covered paperwork. Your agency's CIO should be able to assist you in complying with the Paperwork Reduction Act.

Information Quality Guidelines

Under the Information Quality Law, agency guidelines, in conformance with the OMB government-wide guidelines (67 FR 8452, February 22, 2002), have established basic quality performance goals for all information disseminated by agencies, including information disseminated in support of proposed and final rules. The data and analysis that you use to support your rule must meet these agency and OMB quality standards. Your agency's CIO should be able to assist you in assessing information quality. The Statistical and Science Policy

Branch of OMB's Office of Information and Regulatory Affairs can provide you assistance. This circular defines OMB's minimum quality standards for regulatory analysis.

Environmental Impact Statements

The National Environmental Policy Act (42 U.S.C. 4321-4347) and related statutes and executive orders require agencies to consider the environmental impacts of agency decisions, including rulemakings. An environmental impact statement must be prepared for "major Federal actions significantly affecting the quality of the human environment." You must complete NEPA documentation before issuing a final rule. The White House Council on Environmental Quality has issued regulations (40 C.F.R. 1500-1508) and associated guidance for implementation of NEPA, available through CEQ's website (http://www.whitehouse/gov/ceq/).

Impacts on Children

Under Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks," each agency must, with respect to its rules, "to the extent permitted by law and appropriate, and consistent with the agency's mission," "address disproportionate risks to children that result from environmental health risks or safety risks." For any substantive rulemaking action that "is likely to result in" an economically significant rule that concerns "an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children," the agency must provide OMB/OIRA "an evaluation of the environmental health or safety effects of the planned regulation on children," as well as "an explanation of why the planned regulation is preferable to other potentially and reasonably feasible alternatives considered by the agency."

Energy Impacts

Under Executive Order 13211 (66 FR 28355, May 22, 2001), agencies are required to prepare and submit to OMB a Statement of Energy Effects for significant energy actions, to the extent permitted by law. This Statement is to include a detailed statement of "any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies)" for the action and reasonable alternatives and their effects. You need to publish the Statement or a summary in the related NPRM and final rule. For further guidance, see OMB Memorandum 01-27 ("Guidance on Implementing Executive Order 13211", July 13, 2001), available on OMB's website.

G. Accounting Statement

You need to provide an accounting statement with tables reporting benefit and cost estimates for each major final rule for your agency. You should use the guidance outlined above to report these estimates. We have included a suggested format for your consideration.

Categories of Benefits and Costs

To the extent feasible, you should quantify all potential incremental benefits and costs. You should report benefit and cost estimates within the following three categories: monetized quantified, but not monetized; and qualitative, but not quantified or monetized.

These categories are mutually exclusive and exhaustive. Throughout the process of listing preliminary estimates of benefits and costs, agencies should avoid double-counting. This problem may arise if more than one way exists to express the same change in social welfare.

Quantifying and Monetizing Benefits and Costs

You should develop quantitative estimates and convert them to dollar amounts if possible. In many cases, quantified estimates are readily convertible, with a little effort, into dollar equivalents.

Qualitative Benefits and Costs

You should categorize or rank the qualitative effects in terms of their importance (e.g., certainty, likely magnitude, and reversibility). You should distinguish the effects that are likely to be significant enough to warrant serious consideration by decision makers from those that are likely to be minor.

Treatment of Benefits and Costs over Time

You should present undiscounted streams of benefit and cost estimates (monetized and net) for each year of the analytic time horizon. You should present annualized benefits and costs using real discount rates of 3 and 7 percent. The stream of annualized estimates should begin in the year in which the final rule will begin to have effects, even if the rule does not take effect immediately. Please report all monetized effects in 2001 dollars. You should convert dollars expressed in different years to 2001 dollars using the GDP deflator.

Treatment of Risk and Uncertainty

You should provide expected-value estimates as well as distributions about the estimates, where such information exists. When you provide only upper and lower bounds (in addition to best estimates), you should, if possible, use the 95 and 5 percent confidence bounds. Although we encourage you to develop estimates that capture the distribution of plausible outcomes for a particular alternative, detailed reporting of such distributions is not required, but should be available upon request.

The principles of full disclosure and transparency apply to the treatment of uncertainty. Where there is significant uncertainty and the resulting inferences and/or assumptions have a critical effect on the benefit and cost estimates, you should describe the benefits and costs under plausible alternative assumptions. You may add footnotes to the table as needed to provide documentation and references, or to express important warnings.

In a previous section, we identified some of the issues associated with developing estimates of the value of reductions in premature mortality risk. Based on this discussion, you should present alternative primary estimates where you use different estimates for valuing reductions in premature mortality risk.

Precision of Estimates

Reported estimates should reflect, to the extent feasible, the precision in the analysis. For example, an estimate of $220 million implies rounding to the nearest $10 million and thus a precision of +/-$5 million; similarly, an estimate of $222 million implies rounding to the nearest $1 million and thus, a precision of +/-$0.5 million.

Separate Reporting of Transfers

You should report transfers separately and avoid the misclassification of transfer payments as benefits or costs. Transfers occur when wealth or income is redistributed without any direct change in aggregate social welfare. To the extent that regulatory outputs reflect transfers rather than net welfare gains to society, you should identify them as transfers rather than benefits or costs. You should also distinguish transfers caused by Federal budget actions -- such as those stemming from a rule affecting Social Security payments -- from those that involve transfers between non-governmental parties -- such as monopoly rents a rule may confer on a private party. You should use as many categories as necessary to describe the major redistributive effects of a regulatory action. If transfers have significant efficiency effects in addition to distributional effects, you should report them.

Effects on State, Local, and Tribal Governments, Small Business, Wages and Economic Growth

You need to identity the portions of benefits, costs, and transfers received by State, local, and tribal governments. To the extent feasible, you also should identify the effects of the rule or program on small businesses, wages, and economic growth.[30] Note that rules with annual costs that are less than one billion dollars are likely to have a minimal effect on economic growth.

[30] The Regulatory Flexibility Act (5 U.S.C. 603(c), 604).

OMB #: **Agency/Program Office:**
Rule Title:
RIN#: **Date:**

Category	*Primary Estimate*	*Minimum Estimate*	*Maximum Estimate*	*Source Citation (RIA, preamble, etc.)*
BENEFITS				
monetized benefits				
Annualized quantified, but unmonetized, benefits				
unquantified) benefits				
COSTS				
Annualized monetized costs				
Annualized quantified, but unmonetized, costs				
Qualitative (unquantified) costs				
TRANSFERS				
Annualized monetized transfers: "on budget"				
from whom to whom?				
Annualized monetized transfers: "off-budget"				
From whom to whom?				
Category	*Effects*			*Source Citation (RIA, preamble, etc.)*
Effects on State, local, and/or tribal governments				
Effects on small businesses				
Effects on wages				
Effects on growth				

H. Effective Date

The effective date of this Circular is January 1, 2004 for regulatory analyses received by OMB in support of proposed rules, and January 1, 2005 for regulatory analyses received by OMB in support of final rules. In other words, this Circular applies to the regulatory analyses for draft proposed rules that are formally submitted to OIRA after December 31, 2003, and for draft final rules that are formally submitted to OIRA after December 31, 2004. (However, if the draft proposed rule is subject to the Circular, then the draft final rule will also be subject to the Circular, even if it is submitted prior to January 1, 2005.) To the extent practicable, agencies should comply earlier than these effective dates. Agencies may, on a case-by-case basis, seek a waiver from OMB if these effective dates are impractical.